

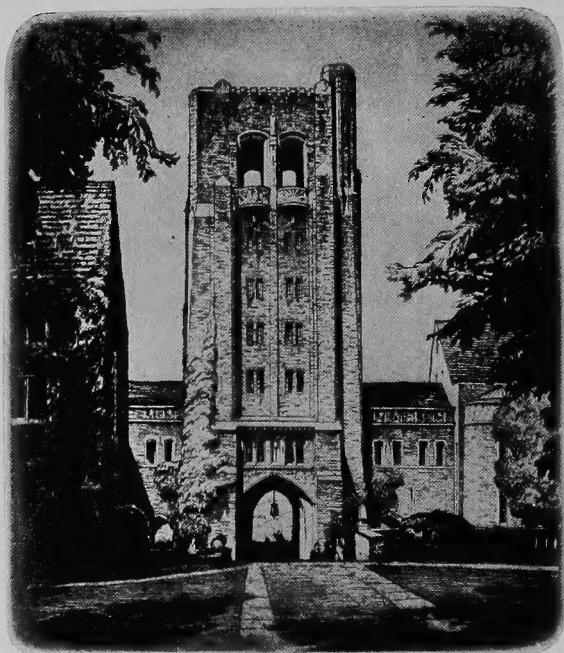


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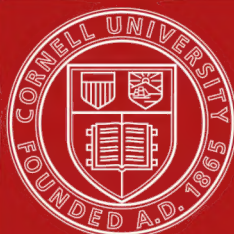
A treatise on the civil jurisdiction of



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A TREATISE
ON THE
CIVIL JURISDICTION
OF
JUSTICES OF THE PEACE
IN THE
STATE OF NEW YORK.

BY ESEK COWEN,
COUNSELOR-AT-LAW.

FIFTH EDITION.

RE-WRITTEN AND ADAPTED TO THE PRESENT STATE OF THE LAW, NOT ONLY IN
THE STATE OF NEW YORK, BUT ALSO IN THE OTHER, AND
ESPECIALLY THE WESTERN STATES.

BY LEWIS KINGSLEY,
COUNSELOR-AT-LAW.

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PREFACE.

It is with great diffidence that this edition of COWEN'S TREATISE is submitted for the approbation and use of that large number who are concerned in the jurisdiction and practice of justices' courts in this country. The scope of the original work was so comprehensive, and that and the subsequent editions were received with such unexampled and merited confidence, that any one might well shrink from the preparation of another and later edition to take their places, which should embody merely the numerous changes in the statutes, and the large body of the decisions reported since 1856, in New York alone. When to this, it is added, that its plan further embraced the collation and addition of the decisions of other, and especially the western States, with all practical references to their statutes; a plan which has been carried out to the best of the editor's ability, in the limited space at his disposal; it will be seen that an additional labor and responsibility were imposed, of which, indeed, those only can have an adequate conception who are aware of the hundreds of volumes of reports which embrace those decisions, and know the varied, important, and practical character of the opinions published therein, and the great learning and ability of the judges by whom they were delivered.

This task, however imperfectly it is performed, has been laboriously, carefully and honestly executed. And it is hoped that the effort has not been in vain. The object was to add to the usefulness of the treatise, already so eminently useful even to the legal profession, by making it give the law, as it now is, and that throughout the whole country so that it should be a manual to guide

justices and suitors, and practitioners in their courts in every State of the Union.

If this object has been attained, even to a limited degree, and if the editor has, by his effort, added anything to the knowledge of the law, or aided in its intelligent enforcement, he will feel himself amply rewarded.

LEWIS KINGSLEY.

November 1st, 1870.

PREFACE TO THE FOURTH EDITION.

COWEN'S TREATISE upon the civil jurisdiction of justices of the peace was published by its author, the late Mr. Justice COWEN, in 1821. Previous to that period no convenient manual for the use of justices of the peace in this State had appeared. The work supplied the want in an eminently useful manner. Two editions were subsequently published; one in 1841, prepared under the author's supervision, by his son, the late SIDNEY J. COWEN, Esq., and another in 1844, edited by OLIVER L. BARBOUR, Esq. In each of these editions the changes in the law, effected by statutory enactments, and the decisions of the courts, were incorporated in the text or referred to in notes, so as to bring the doctrines of the law contained in it, down to the date of its publication. The adoption of the constitution of 1846, and the changes in many of the features of the common law effected by recent legislation, and in the ancient systems of pleading and practice by the Code of Procedure, have rendered the treatise in many respects obsolete, and required it to undergo extensive alterations to adapt it to the existing laws. The subscriber, at the instance of the publishers, undertook the preparation of an edition with the intention of modifying, where necessary, the text of the last edition, so as to render it conformable to the present state of the law. It, however, soon became apparent that he would fail in accomplishing the purpose aimed at, without making a material change in the order in which a large number of the subjects were treated in the original treatise, and very considerable omissions and additions. The plan was therefore adopted of re-writing it, using with freedom the

language of the author, but varying from and modifying it whenever it was deemed desirable. In doing this the text has been divided into sections, for the double purpose of facilitating the reference to particular parts or subjects, and of giving greater distinctness to the propositions upon each title of the law treated of. The subscriber has endeavored to render the text conformable to the most recent decisions of our courts, and to furnish in the marginal notes, references to authorities which sustain each position and doctrine, while he has omitted many of the citations contained in the original work, of early English authorities now rarely accessible in the libraries of country practitioners, to which justices must generally resort for reference, and supplied their places with citations from our own reports, where their doctrine has been recognized.

WILLIAM TRACY.

UTICA, *May 1st*, 1854.

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TREATISE.

CHAPTER I.

OF A JUSTICE AND THE JURISDICTION OF JUSTICES' COURTS.

§ 1. JUSTICES of the peace are constitutional officers, and a branch of the judiciary of the state. Their office is not a town, but a county office,¹ and their territorial jurisdiction extends throughout the county in which they are elected. A justice of the peace must reside in the town for which he is chosen, and cannot try a civil action in any other town except in cases otherwise provided by law,² but he may issue process at any place in the county to be executed anywhere therein. He can, accordingly, act as conservator of the peace, and execute his criminal jurisdiction anywhere in the county, and send his civil process to any place therein;³ he may, also, issue an attachment, and make it returnable,⁴ or take the confession of a judgment, at any place within his county.⁵ If he be an innholder or tavern-keeper, whether with or without a license, he has no jurisdiction except to issue executions upon judgments rendered before him before he became one.⁶ This disqualification, however, relates only to his civil jurisdiction, and does not prevent him, although an inn-keeper, from the exercise of criminal authority, or of the various summary powers conferred by statute, such as the power to collect a forfeiture incurred by disobedience of an order of a commissioner of highways.⁷ He cannot entertain an action where he is within the ninth degree of kin either by consanguinity or affinity to either of the parties.⁸ The *degrees* of consanguinity are determined

¹ 17 N. Y. 381. 25 Barb. 421. 29 id. 208. ² 2 R. S. 225, § 6. 3 id. (Banks' 5th ed.) 427, §§ 3 and 4.

³ 1 R. S. 102, § 12. id. (Banks' 5th ed.) 383, § 10. ⁴ 7 Barb. 337.

⁵ 2 Barb. Ch. 331. 21 Wend. 63. 1 Hill, 654. 2 R. S. 275, § 2. 3 id. (Banks' 5th ed.) 465.

⁶ 9 Wend. 319.

⁷ 10 Wend. 196.

⁸ 17 How. Pr. R. 109.

by commencing with the common ancestor of the persons between whom they exist, and counting each generation downward to the one farthest removed.¹ The number of generations denotes the degree. Thus, if both are grandchildren of a common ancestor, they are cousins in the third degree; if one is a grandchild and the other a great-grandchild, they are cousins in the fourth degree. Degrees of affinity are determined by regarding a husband or wife of a blood relative of the same degree as such relative. Kin by affinity ceases on the death of the blood relative whose marriage occasioned it, unless there be issue of the marriage, in which case the blood of the issue keeps up the affinity.² Thus, a father is no longer of kin to his daughter-in-law after the death of her husband, unless she have children. If she have children, the blood relationship between the children and their grandfather and their mother preserves the affinity.³ This relationship extends only to relatives by blood, a husband or a wife being related by affinity to the other's blood relatives; but the blood relatives of the husband are not at all related to the blood relatives of the wife, nor are hers related to those of the husband, so that a justice whose brother was the husband of the plaintiff's sister was held competent to try the cause.⁴ In Indiana a justice has no jurisdiction of a cause where his brother-in-law is a party;⁵ and such is the rule in Wisconsin as to a son-in-law;⁶ but he has where a brother-in-law is a party.⁷ In California, consanguinity and affinity are computed according to the common law, and by section 87 of the act concerning courts of justice a judge is disqualified when he is related to either party by consanguinity or affinity within the third degree.⁸ In Indiana the degree is the sixth, according to the civil law,⁹ and either party may make the objection.¹⁰

[§ 1*a*.] There are a variety of acts required to be performed by a justice, not of a judicial, but a ministerial character, like taking and certifying the acknowledgment of a deed; and such acts a justice, though related to the parties, has the right to perform.¹¹

§ 2. This disqualification extends to cases where the justice is related to one of several parties; or to a stockholder in a corporation which is a party to a suit before him.¹² Where the parties to an

¹ 4 Kent, 412.

² 7 Cowen, 478. 1 Denio, 25. 2 Barb. Ch. 231.

³ Id.

⁴ 1 Denio, 186.

⁵ 3 Ind. 398.

⁶ 16 Wis. 633.

⁷ 4 Chand. 24.

⁸ 23 Cal. 592. 24 id. 73.

⁹ 18 Ind. 1.

¹⁰ 10 Ind. 299.

¹¹ 2 Seld. 422.

¹² 17 Barb. 414. 28 id. 503.

action are residents of the county, the justice cannot entertain it unless some of them reside in his town or an adjoining town;¹ under this statute, it is held that two towns which only corner with each other are adjoining;² but if the defendant has absconded leaving property in his town, or if all the plaintiffs or the defendant be non-resident, then the justice of any town in which such absconding defendant or his property, or in which such non-resident plaintiffs or defendants may be, at the commencement of the suit, may entertain jurisdiction of an action;³ an action in favor of a county may be prosecuted before any justice before whom an individual could bring it;⁴ and the same rule applies to suits brought by towns, except those for penalties given to them, in which case they may be brought before any other justice residing in the county.⁵ This statute, however, applies to those cases only in which the penalty is given directly to the town in its corporate capacity, and not to those in which the action is brought by its officers, and it is interested in the amount recovered only.⁶ If a justice is a member of the legislature, he is not obliged to take cognizance of an action, but may in his discretion.⁷

§ 3. Under the ancient system of pleading, actions were divided into several distinct forms, as debt, covenant, trespass on the case, trespass, replevin, &c. Some of these were and some were not within the jurisdiction of justices of the peace. These forms of action have been superseded in the Code by the *civil action*, which furnishes the remedy for the enforcement of all private rights and the redress of all private wrongs. In all cases, therefore, where one has failed to keep a contract with another, or where he has wrongfully or negligently injured him, whether by a direct act or in consequence of an act or omission of duty, a *civil action* can be maintained by the party injured. The jurisdiction of a justice is, however, limited to the actions enumerated in the next section.

§ 4. By section 53 of the Code of Procedure, as amended by various statutes, justices' courts have cognizance of the following actions and no other:

1. An action arising on contract for the recovery of money only, if the sum claimed do not exceed two hundred dollars.

¹ 2 R. S. 226, § 8. 3 id. (Banks' 5th ed.) 427, § 6.

² 31 N. Y. 289.

³ 2 R. S. 226, § 9. 3 id. (Banks' 5th ed.) 527, § 7. 10 Wend. 358.

⁴ 1 R. S. 384, § 5. Id. (Banks' 5th ed.) 901.

⁵ 1 R. S. 357, § 5. Id. (Banks' 5th ed.) 837.

⁶ 6 Hill, 58.

⁷ 2 R. S. 226, § 7. 3 id. (Banks' 5th ed.) 427, § 5.

2. An action for damages for injury to rights pertaining to the person, or to personal or real property, if the damages claimed do not exceed two hundred dollars.

3. An action for a penalty not exceeding two hundred dollars.

4. An action commenced by attachment of property as now provided by statute, if the debt or damages claimed do not exceed two hundred dollars.

5. An action upon a bond conditioned for the payment of money not exceeding two hundred dollars, though the penalty exceed that sum, the judgment to be given for the sum actually due. Where the payments are to be made by installments, an action may be brought for each installment as it shall become due.

6. An action upon a surety bond taken by a justice, though the penalty or amount claimed exceed two hundred dollars.

7. An action on a judgment rendered in a court of a justice of the peace, or of a justice's or other inferior court in a city where such action is not prohibited by section 71 of the Code of Procedure.

8. To take and enter judgment on the confession of a defendant where the amount confessed shall not exceed five hundred dollars, in the manner prescribed by article eight, title four, chapter two of part three of the Revised Statutes.

9. An action for damages for fraud in the sale, purchase or exchange of personal property, if the damages claimed do not exceed two hundred dollars.

10. An action to recover the possession of personal property claimed, the value of which, as stated in the affidavit of the plaintiff, his agent or attorney, shall not exceed the sum of one hundred dollars.

The plaintiff in such action, at the time of issuing the summons, but not afterwards, may claim the immediate delivery of such property, as hereinafter provided.

Before any process shall be issued in an action to recover the possession of personal property, the plaintiff, his agent, or attorney, shall make proof by affidavit, showing:

1. That the plaintiff is the owner, or entitled to immediate possession of the property claimed, particularly describing the same.

2. That such property is wrongfully withheld or detained by the defendant.

3. The cause of such detention or withholding thereof, according to the best knowledge, information, and belief of the person making the affidavit.

4. That said personal property has not been taken for any tax, fine, or assessment, pursuant to statute, or seized by virtue of an execution or attachment against the property of said plaintiff; or if so seized, that it is exempt from such seizure by statute.

5. The actual value of said personal property.

On receipt of such affidavit, and an undertaking in writing, executed by one or more sufficient sureties, to be approved by the justice of the peace before whom such action is commenced, to the effect that they are bound in double the value of such property as stated in said affidavit for the prosecution of said action, and for the return of said property to the defendant, if return thereof be adjudged; and for the payment to him of such sum as may for any cause be recovered against said plaintiff, the justice shall endorse upon said affidavit a direction to any constable of the county in which said justice shall reside, requiring said constable to take the property described therein from the defendant, and keep the same, to be disposed of according to law; and the said justice shall at the same time issue a summons directed to the defendant, and requiring him to appear before said justice at a time and place to be therein specified, and not more than twelve days from the date thereof, to answer the complaint of said plaintiff; and the said summons shall contain a notice to the defendant that in case he shall fail to appear at the time and place therein mentioned, the plaintiff will have judgment for the possession of the property described in said affidavit, with the costs and disbursements of said action.

The constable to whom said affidavit, endorsement, and summons shall be delivered, shall forthwith take the property described in said affidavit, if he can find the same, and shall keep the same in his custody. He shall thereupon, without delay, serve upon said defendant a copy of such affidavit, notice, and summons, by delivering the same to him personally, if he can be found in said county; if not found, to the agent of the defendant in whose possession said property shall be found; if neither can be found, by leaving such copies at the last or usual place of abode of the defendant, with some person of suitable age and discretion. And shall forthwith make a return of his proceedings thereon, and the manner of serving the same, to the justice who issued the said summons.

The defendant may at any time after such service, and at least two days before the return day of said summons, serve upon plaintiff, or upon the constable, who made such service, a notice in writing that he excepts to the sureties in said bond or undertaking; and if he

fail to do so, all objection thereto shall be waived. If such notice be served, the sureties shall justify or the plaintiff give new sureties on the return day of said summons; who shall then appear and justify, or said justice shall order said property delivered to defendant, and shall also render judgment for defendant's costs and disbursements.

At any time before the return day of said summons, the said defendant may, if he has not excepted to plaintiff's sureties, require the return of said property to him, upon giving to the plaintiff, and filing same with the justice, a written undertaking, with one or more sureties, who shall justify before said justice on the return day of said summons, to the effect that they are bound in double the value of said property, as stated in plaintiff's affidavit, for the delivery thereof to said plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against said defendant; and if such return be not required before the return day of said summons, the property shall be delivered to said plaintiff.

The qualification of sureties, and their justification under this act, shall be the same as provided in sections 194 and 195 of the Code, in respect to bail or arrest in the supreme court.

Sections 214, 215 and 216 of the Code shall apply to proceedings and actions brought under this act, substituting the word constable for the word sheriff wherever it occurs in either of said sections.

The actions so commenced shall be tried in all respects as other actions are tried in justices' courts. The judgment for the plaintiff may be for the possession, or for the recovery of the possession, or the value thereof, in case a delivery cannot be had, and of damages for the detention. If the property have been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same. An execution shall be issued thereon, and if the judgment be for the delivery of the possession of personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs or damages recovered by the same judgment out of the personal property of the party against whom it was rendered, to be specified therein, if a delivery thereof cannot be had. The execution shall be returnable within sixty days, after its receipt by the officer, to the justice who issued the same.

In all actions for the recovery of the possession of personal property, as herein provided, if the property shall not have been delivered to plaintiff, or the defendant by answer shall claim a return thereof, the justice or jury shall assess the value thereof, and the injury sustained by the prevailing party by reason of the taking or detention thereof, and the justice shall render judgment accordingly, with costs and disbursements.

If it shall appear by the return of a constable that he has taken the property described in the plaintiff's affidavit, and that defendant cannot be found, and has no last place of abode in said county, or that no agent of defendant could be found on whom service could be made, the justice may proceed with the cause in the same manner as though there had been a personal service.

For the endorsement on said affidavit, the justice shall receive an additional fee of twenty-five cents, which shall be included in the costs of the suit.

(A decision of the Oneida county court, holds that in the cases included in this subdivision, the defendant has the right to demand a trial by a jury of twelve men, and that, if he does so, the case must be dismissed, because a justice cannot summons such a jury.¹)

11. Any innkeeper, boarding house keeper, mechanic, workman or bailee, who shall have a lien upon any chattel property, may commence an action in any court having jurisdiction of the amount of such lien, for an enforcement and foreclosure thereof.

Such action shall proceed in all respects, as civil actions, in the court in which the same is commenced.

The judgment in such action may be the same as in other civil actions in the same court, and in addition thereto, if in favor of the plaintiff, may fix the amount of such lien, and adjudge the foreclosure of the same and the sale of the chattel property affected thereby, and specify the officer who shall make such sale, and in such case shall direct the disposition of the proceeds thereof, to the payment of the amount of such lien with the costs of the action, and the costs and expenses of such sale, and shall provide for the safe keeping of any surplus arising thereon, and the payment thereof to the owner of such chattel property or his assigns or representatives.

There shall be the same right of appeal from the judgment in such action, as in other civil actions, in the court in which the same shall be commenced.

Nothing in this act contained shall be held or construed, to affect

¹ 37 How. P. R. 140.

or impair the right of any person to enforce or foreclose a lien upon chattel property in any other manner than as herein provided. (*Laws of 1869, vol. 2, ch. 738, pp. 1785-6.*)

§ 5. By section 54 of the Code it is provided that no justice shall have cognizance of a civil action :

1. In which the people of this state are a party, excepting for penalties not exceeding one hundred dollars.

2. Nor where the title to real property shall come in question, as provided by sections 55 to 62 inclusive of the Code of Procedure.

3. Nor of a civil action for an assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation or seduction.

4. Nor of a matter of account where the sum total of the accounts of both parties, proved to the satisfaction of the justice, shall exceed four hundred dollars.

5. Nor of an action against an executor or administrator.

§ 6. Under the first class of actions in section 53 of the Code, are included judgments,¹ all claims for money owing, whether arising upon written instruments or upon any promises or obligations not in writing, or any contracts express or implied, as for the price of goods sold, or the value of services performed at another's request, whether the price was agreed upon or not. For in the absence of proof to the contrary, the law assumes that whenever it is the duty of a party to pay another for any service or thing, there exists a contract that he will. The language of the statute is "on contract for the recovery of *money only*." This however includes all claims for failure of express contracts to pay one a certain sum in property not money, or a certain quantity of any article, as a note for ten barrels of flour, or ten dollars in potatoes. In these cases if the debtor does not pay in the articles agreed upon, the contract becomes one to pay in money. If the claim exceed two hundred dollars, a justice cannot entertain jurisdiction of it.² If however the plaintiff only demand judgment for two hundred dollars, he may act although there be actually due a greater sum upon the contract.³ If he claims damages, in his complaint, for "two hundred dollars *and over*," the words "or over" are void for uncertainty, and, judgment being taken for not exceeding the jurisdiction, it is good.⁴

§ 7. Under the second class, the law assumes to furnish an indem-

¹ 23 Barb. 318. 2 Sand., 402. See ³ 9 John. 366. 6 Hill, 631. Also 1 sub. 7. Wash. T. 86.

² 14 Barb. 250.

⁴ 5 Barb. 573.

nity for any injuries which one may sustain, either directly or consequentially, from the wrong or negligence of another. The limitation contained in section 5, *supra*, excludes many cases arising in this class from the jurisdiction of a justice. Among those that are cognizable are actions for injuries to one's person, or the person of his wife, child or servant, from the negligence of another. A direct injury thus inflicted without intentional violence is not an assault and battery. Actions for injuries to either real or personal property are within this class, excepting where the title to real property shall come in question, in which case, as we have just seen, the justice has no jurisdiction. Although the Code, section 123, provides that actions for injuries to real property must be brought within the county in which the property is situated, this rule does not apply to justices' courts.¹

§ 8. Actions under the third subdivision must be brought in the county where the cause arose.² This class of actions is brought for violation of particular statutes, as for keeping an unlicensed tavern, winning at play, setting up a raffle or lottery, profane swearing, penalties imposed by municipal corporations for violation of their by-laws and ordinances, and the like.³ It seems that if an officer who is liable to a penalty, has removed to another county, the action may be brought in that county in which he resides.⁴

§ 9. The cases provided for in the fourth and fifth subdivisions are of a similar nature to those in the first subdivision. The only actions commenced by attachment are such as arise upon contract. While the jurisdiction, as given in clause five, seems to be general, it is doubtful if it allows actions on bonds given by executors or administrators.⁵

§ 10. The sixth subdivision includes actions upon all the surety bonds which a justice is authorized to take, notwithstanding the amount that may be due upon them, or that is claimed in the complaint.

§ 11. The actions upon justices' judgments, which by the seventh subdivision are permitted to be brought, are by the 71st section of the Code forbidden to be brought in the same county within five years after their rendition, except in case of the death, resignation, incapacity to act, or removal from the county of the justice before whom they were recovered, the death of some of the parties, the loss of the

¹ 2 Denio, 639. 22 N. Y. 470. 20 Barb. 251.

² 2 R. S. 482, §§ 8, 9. These sections are not superseded by § 124 of the Code, which only relates to actions in the supreme court.

³ 2 Hill, 296.

⁴ 13 Wend. 265.

⁵ 1 E. D. Smith, 404. 10 Abbott, 431

docket or record, or when the process was not served personally on the defendant or some of the defendants. The justices' jurisdiction of cases in this class is unlimited as to amount.¹

§ 12. The power to take the confession of judgments given in subdivision eight, is subject, under the Revised Statutes,² to several limitations, which will be given in a subsequent part of this work.³

§ 13. The ninth subdivision includes all cases where one is injured by the fraud or deceit of another in the purchase or sale of personal property, and whether the fraud consists in false representations or a willful concealment of a known defect in the article sold, to the prejudice of the other party.

§ 14. The limitations of a justices' jurisdiction, as above given,⁴ require but little notice here. Cases where the title to real estate comes in question, will be more fully considered in a subsequent portion of this work. An action for injury to personal property is prohibited by this provision, if it appear that the damage was done in connection with an assault upon the person.⁵ It seems, however, that an action may be maintained before a justice for an assault and battery upon a servant,⁶ the injury being a consequential one to the plaintiff, and the judgment not being for the servant's sufferings.

§ 15. The limitation of the jurisdiction where the sum total of the accounts of both parties proved to the satisfaction of the justice, exceeds four hundred dollars, is held to apply in cases where the demands existing between the parties are open and unliquidated. Where there has been a settlement between the parties and a balance has been found, that balance is the claim, and unless with the subsequent accounts it exceeds four hundred dollars, an action for it may be maintained before a justice of the peace.⁷ So, if payments have been made, the amount left after deducting them is the total of the accounts of the parties.⁸ It is otherwise in the case of a set-off.⁹ The amounts of the respective accounts may be arrived at by evidence or the admissions of the parties.¹⁰ And when so ascertained, if they exceed four hundred dollars, the justice must enter a judgment of discontinuance, with costs.¹¹ His decision on the question

¹ 23 Barb. 313.

² 2 R. S. 245, § 114. 3 *id.* (Banks' 5th ed.) 443, § 105.

³ *Infra*, §§ 1542, &c.

⁴ *Ante*, § 5.

⁵ 4 Denio, 453.

⁶ 1 Pennington, 111.

⁷ 2 Cowen, 413.

⁸ 10 Wend. 555 and 557, note. 4 Denio, 370. 1 E. D. Smith, 538. 15 How. Pr. R. 280.

⁹ 10 Wend. 555, 557, note. 4 Denio, 370.

¹⁰ 5 Duer, 691.

¹¹ 2 R. S. 235, § 54. 3 *id.* (Banks' 5th ed.) 435, § 52.

whether or not the amounts exceed four hundred dollars cannot be given till evidence has been introduced; and till the decision is made thereon he has jurisdiction.¹

§ 16. A justice of the peace has power to punish, as for a criminal contempt, persons guilty of the following acts:

1. Disorderly, contemptuous or insolent behavior towards him while engaged in the trial of a cause or in the rendering of any judgment, or in any judicial proceedings, which shall tend to interrupt such proceedings or to impair the respect due to his authority.

2. Any breach of the peace, noise or other disturbance tending to interrupt the official proceedings of a justice.

3. Resistance willfully offered by any person, in the presence of a justice, to the execution of any lawful order or process made or issued by him.²

These powers allow the justice to repress and punish all disorderly behavior from parties, counsel or bystanders;³ the third subdivision does not extend to a mere omission to obey an order or process, but only to an affirmative act interfering with or obstructing its execution.⁴ This subject is further considered in a subsequent portion of this treatise.⁵

§ 17. The total want of jurisdiction renders any proceeding before a justice void, and in such case he is accountable for any injuries arising from his acts. The rule is, that where he has no jurisdiction, his acts are *void*; but where he has jurisdiction and errs in its exercise, his acts are *voidable*, and can be taken advantage of only by the review of an appellate court. In the former case he is liable for his acts; in the latter he is not.

§ 18. There is a class of cases where the justice has jurisdiction of the subject matter of the action, or of the class of persons in relation to whom he acts, but has no jurisdiction to act in the particular case before him, in which he is not held answerable for what he has done in good faith. Thus, where a justice was authorized to issue a warrant without oath against all persons except freeholders, and he issued one against a freeholder; having acted in good faith, he was held not liable in an action for false imprisonment, for the reason that he had general jurisdiction of the process in certain cases with

¹ 52 Barb. 147.

² 3 Parker, 506. 9 How. Pr. R. 419

³ 2 R. S. 273, § 274. 3 id. (Banks' 5th 14 id. 245.

ed.) 460, § 199.

⁵ Sections 1334, &c.

⁴ 3 Hill, 328.

out oath; and for an error in awarding it against the freeholder without knowing him to be one, he was not answerable.¹

§ 19. Where a justice has not jurisdiction of the *subject matter* of the action, no consent or arrangement of parties can confer it upon him. He cannot try an action where the amount claimed exceeds his jurisdiction, nor for any of the classes of cases which are expressly excluded from his jurisdiction, notwithstanding the parties consent to his doing so, and in such cases any judgment rendered by him would be void.²

§ 20. Consent, however, will confer jurisdiction over the *person*. Thus, a party over whom the justice would have no jurisdiction, may, by a voluntary appearance, confer it upon him;³ and one who has been served with void or irregular process will waive the irregularity and confer jurisdiction on the justice, by appearing and pleading to the merits of the action.⁴ So any irregularities in the issuing or service of process, and all defects either in form or substance, are waived and cured by the defendant appearing and neglecting to take advantage of them at the first opportunity.⁵ Thus if process be void because of some defect in the manner in which it is issued, yet if the defendant appear at the return day, and without interposing the objection join issue upon the merits, the justice's jurisdiction over his person will be complete.⁶ So if he plead or take any step which assumes that the process is good, whether he know of the irregularity or not, he cannot afterwards object to the process itself.⁷ But the mere act of appearing at the return, for the purpose of raising an objection to it, and upon its being overruled answering to the complaint is not a waiver.⁸

§ 21. The effect of a want of jurisdiction upon the officer who executes process issued to enforce the judgment, will be considered hereafter.

¹ 6 Wend. 597.

² 8 John. 409. 6 Wend. 465. 3 Comstock, 552. 22 Barb. 323. 2 Ohio N. S. 223. 1 Wis. 597. 1 Minn. 365. 18 Ind. 1. 10 Iowa, 380. 1 Nevada, 82. 1 Wash. T. 57.

³ 1 Sand. 19. 2 E. D. Smith, 38. 2 Ohio N. S. 223. 1 Wis. 597. 18 Ind. 1.

⁴ 3 Comstock, 132. 1 Seld. 434. 26 N. Y. 418. 52 Barb. 158.

⁵ 14 John. 481. 1 Seld. 531. 35 Barb. 49. ⁶ 2 Hill, 657.

⁷ 5 Cowen, 15. 6 Hill, 343.

⁸ 14 John. 481. 17 Wend. 85. 17 Barb. 424.

CHAPTER II.

OF THE NATURE OF THE CAUSES OF ACTION OF WHICH A JUSTICE OF THE PEACE HAS JURISDICTION.

§ 22. I. OF ACTIONS ARISING ON CONTRACT FOR THE RECOVERY OF MONEY ONLY. In section 6 a general view of the class of actions arising on contract is given. A contract is an agreement "between competent parties, upon a legal consideration to do, or abstain from doing, some act,"¹ or that another shall or shall not do it, or that a particular matter is or is not so. Thus one may contract that another shall pay his own debt, that another shall not institute a specified proceeding, or the like, or that certain lands are free from encumbrance, or that he is seized of them in fee.

§ 23. Contracts are divided into three classes; *contracts of record*, such as judgments and recognizances; *specialties* or sealed contracts, as deeds, covenants and bonds; and *simple contracts*, in which class are included agreements not under seal, whether in writing or mere verbal promises. Simple contracts are sometimes called *parol* contracts or *parol* agreements, and this notwithstanding they are in writing.²

§ 24. Every contract is founded on the mutual agreement, express or implied, of the parties to it.³

In an express contract the minds of the parties have met and they have agreed upon its terms and conditions, and are held by them. Such a contract may be made by the parties or their agents when together, or by offers made and accepted by letters or telegraphic despatches.⁴ Some instances are given in the note. In case of letters, the agreement is complete when one proposes by mail to make a contract with another residing at a distance, and the latter deposits his acceptance in the post office, addressed to and to be transmitted to the former, unless either letter shall require something more before the contract

¹ Story on Con. § 1. 2 Bl. Com. 446. 4 ⁴ 18 Ill. 483. 3 Cal. 147. 35 id. 291. Wheat. 197. 5 Iowa, 336. 7 Wis. 413. 5 Minn. 382.

² Story on Con. § 2.

13 Ohio N. S. 84. 17 Ind. 284.

³ See 35 Cal. 91. 25 Iowa, 453.

is binding.¹ The rule is the same in regard to telegrams, in which case an agreement to communicate by telegram is no warranty by either party that the telegrams shall be received:² although the party making the offer is dead when the letter reaches its destination, the contract is perfect, provided he was alive when it was mailed; otherwise if he was then dead.³ In all such cases, the acceptance must be sent in a reasonable time,⁴ and the postage paid.⁵ What is the effect of the omission of the stamp required on agreements by the United States revenue law, is not yet judicially determined.

Implied contracts are such as have not been distinctly settled by the parties, and where the contract is a legal inference from the acts of the parties or the obligations imposed upon them by some law,⁶ in which cases "the parties are supposed to have made those stipulations, which, as honest, fair and just men, they ought to have made."⁷ Instances of these are where a husband drives his wife from his house and refuses to support her;⁸ where one avails himself of the services of another;⁹ or buys an article without agreeing for its price;¹⁰ or wrongfully takes the property of another;¹¹ or uses it;¹² or accepts a gift conditioned upon the payment of an annuity,¹³ or a deed which requires him to discharge an encumbrance on the land conveyed.¹⁴ In these and similar cases as also in cases of guaranty or suretyship,¹⁵ the law assumes an agreement to pay, and an action may be brought accordingly.¹⁶ When a person procures articles for the proper burial of a dead neighbor, the facts being known to the one from whom they are purchased, no promise is implied that the one so procuring them will pay for them.¹⁷

§ 25. A sufficient and lawful consideration is absolutely necessary to the validity of a contract, and an agreement to pay or to do anything without any compensation is void in law.¹⁸ Thus, if I promise to pay John fifty dollars, this does not bind me although it may be in writing, unless it is for something which John either has done at my request or has promised to do for me. This rule however does

¹ 6 Wend. 103. 1 Kern. 441. 19 N. Y. 111. 1 Transcript, 248. 20 Barb. 42. 48 id. 614. 52 id. 159. 41 Ill. 394.

² 36 N. Y. 307. 37 id., 457. 35 Barb. 463. 1 Transcript, 248. 6 id. 138.

³ 6 Wend. 103.

⁴ 20 Barb. 42. 35 id. 272.

⁵ 24 How. Pr. R. 111.

⁶ 29 Barb. 59. 30 id. 238.

⁷ 12 Wheat. 341

⁸ 41 Barb. 558.

⁹ 3 John. 201.

¹⁰ 2 Phil. Evi. 112. 2 Saund. 122, n. 2.

¹¹ 5 Denio, 370. 7 How. Pr. R. 278.

¹² 28 N. Y. 379.

¹³ 24 N. Y. 130. 30 Barb. 292.

¹⁴ 24 N. Y. 178. 29 Barb. 524.

¹⁵ 32 Ill. 505.

¹⁶ See 30 Barb. 238. 1 Nevada, 20.

¹⁷ 23 Ind. 190.

¹⁸ Story on Con. § 427. 19 Barb. 291. 3 Minn. 126.

not affect a gift, or an assignment of a thing in action, either of which do not require any consideration, and are perfect on delivery.¹ And where one is required, any consideration agreed on by the parties, however trifling, is sufficient to prevent the agreement being void.² But a distinction is here to be taken between a valuable consideration, other than money, and a money consideration. In the former case, the slightest consideration supports the most onerous obligation; in the latter the liability is limited to the actual amount of the consideration.³ A moral obligation, where there has been a prior legal obligation to pay a debt, but which has been barred by operation of law or otherwise, will be sufficient⁴—as a promise to pay a debt which has been barred by an insolvent's discharge.⁵ But the moral obligation alone is not sufficient.⁶ There must have been a prior legal or equitable claim.⁷ Under this rule, where a married woman had bought goods during coverture, concealing her marriage, and after the death of her husband, promised to pay the notes she had given for them (and which under the law as it then stood, she was not legally bound to do), it was held that this promise was binding, and an action upon it was sustained.⁸ A promise to pay my servant, whose whole time and services I have hired, an increased amount, as a stimulus to him, is a gratuitous promise which is not binding.⁹

§ 26. The consideration must be either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made.¹⁰ Thus a promise in consideration of the forbearance of a suit for a certain time is good.¹¹ But such a promise as just spoken of is not valid where there was originally no cause of action.¹² So a payment in advance, or the substitution of a new and valid agreement, extending the time of payment, is a good consideration.¹³ An agreement by a son that his father shall deduct a certain part from his portion is no sufficient consideration.¹⁴ And where an attorney received an order for collection for B, and B directed him to retain from the moneys collected a debt due to him and another, and then

¹ 27 Barb. 178. *Infra*, § 586.

² Story on Con. § 431. 36 N. Y. 473.
46 Barb. 350. 11 Ind. 70. 14 id. 552.

³ 46 Barb. 350. See 17 Ind. 29.

⁴ Story on Con. § 466. 1 Wis. 131.

⁵ 1 Cowen, 249.

⁶ 5 Hill, 306. 26 N. Y. 604, 608, and
refs. 4 Greene, 106. 15 Ind. 59.

⁷ Id. 18 Barb. 545.

⁸ 26 N. Y. 604.

⁹ 1 Wash. T. 65.

¹⁰ Story on Con. § 431. 6 Wend. 648.
30 Barb. 340. 12 Cal. 311. 22 id. 86. 11
Iowa, 314. 13 Minn. 417.

¹¹ Story on Con. § 435. 4 John. 237. 20
Wend. 201. 46 Barb. 218.

¹² 2 Hall, 266.

¹³ 6 Ind. 128. 25 Ill. 457. 26 id. 282
38 id. 209. *Infra*, § 118.

¹⁴ 2 Cowen, 139.

assigned the demand to T, to whom the attorney promised to pay the whole demand when collected, it was held that the promise of the attorney was without consideration as to the sum which B agreed he should retain, and that he was bound to pay no more than the balance after deducting that sum.¹ Compromises of doubtful claims are also a sufficient consideration for promises founded upon them,² as also are agreements to withdraw opposition to the probate of a will.³

§ 27. A promise in consideration of something already done will not be binding, unless such past consideration was performed at the request of the party promising,⁴ or was in its nature of such a character as to impose so strong a moral obligation to make the request that one can be implied.⁵ The subsequent promise, in such cases, must be express; an implied one is not sufficient.⁶ And it has been held that if you get judgment and collect it against me for money which I have paid you, and you afterwards promise to repay it, your promise is binding, on the ground of a prior moral obligation.⁷

§ 28. Anciently the seal upon a contract under seal furnished absolute evidence of a consideration to the contract, whether one did or did not in fact exist. Since the Revised Statutes the rule is changed, and now, in actions brought upon sealed instruments, or in case of set-offs founded upon them (not in any other cases), the seal is only presumptive evidence of a sufficient consideration, which, if the defense be pleaded, may be rebutted in the same manner and to the same extent as if the instrument were not sealed.⁸ It is, however, held that if a consideration is expressed in the instrument, the party is *estopped* by the seal from contradicting the fact or showing that none in fact passed, for the purpose of defeating the deed.⁹

§ 29. Most considerations are reducible to the three following heads: 1. Where the parties mutually agree to give something, comprehending sales, exchanges, loans and the like; 2. Where the parties are mutually to do or forbear something; 3. Where the parties mutually agree, the one to perform any work or business, and the other to give him something for it. This may be either specifically agreed upon, or left to the determination of law to set the value to it. As an

¹ 5 Cowen, 376.

² 44 Barb. 641.

³ 35 Barb. 282.

⁴ 14 John. 378. 12 Iowa, 512.

⁵ 34 Barb. 522.

⁶ 20 Barb. 151.

⁷ 14 John. 468.

⁸ 2 R. S. 406, § 77. 3 id. (Banks' 5th ed.) 691, § 109. 21 Wend. 626. 5 Denio, 308.

⁹ 16 Wend. 460.

agreement to work by the month at a fixed price, or without a price being fixed upon. In the latter case the law implies a contract by the laborer to work for such sum as the labor is reasonably worth, and by the employer to pay it.¹ Mutual promises are always a sufficient consideration for an agreement.² But the agreement must then be entered into by all the parties.³

§ 30. All promises are to be interpreted in cases of doubt, or disagreement in that sense in which the parties, and especially, the promisor know that the promisee, understood them.⁴ It sometimes happens that a written instrument is not executed by all whose names, as contractors, are mentioned in it. Whether, in such cases, those who do sign it are bound, depends upon the circumstances, and these may be proved by parol.⁵ *Prima facie*, they are bound.⁶

§ 31. Express contracts may be made by all persons not incompetent by personal disability or by considerations of public policy.⁷ As they require the mutual understanding and consent of the parties, they cannot be made where either of them is mentally incapable of yielding an intelligent assent to their terms. Thus idiots, lunatics, persons of unsound mind, and drunkards in a state of intoxication rendering them mentally impotent,⁸ are incapable of entering into an express contract, by reason of personal disability; and alien enemies, infants, and with certain exceptions married women, by considerations of public policy.

§ 32. An *idiot*, or natural fool, is one who has had no understanding from his nativity. A *lunatic* is one who has had understanding, but who, by disease, grief or other accident, has lost the use of his reason, and who may or may not have lucid intervals. A person of *unsound mind* is one who from old age, sickness or weakness, is so weak of mind as to be incapable of governing himself and managing his affairs.⁹ The express contracts of idiots, and persons of unsound mind are void. Those of a lunatic before he is declared to be such, by proper proceedings on a commission, are voidable only, and that by the lunatic alone, or those in privity with him.¹⁰ Those made afterwards are void.¹¹ Where no commission has been issued, or it

¹ 20 Barb. 387.

² 2 Paige, 30. 4 Seld. 307. Story on

³ 7 Ohio N. S. 270. 7 Iowa, 232. 29 Ill. 145. 6 Ind. 252. 13 Cal. 330.

Con. § 35.

⁴ 21 Cal. 60. *Infra*, § 30.

⁵ 2 John. Ch. 232. 7 Paige, 236. 25 N. Y. 9. 46 Barb. 230. 36 Ill. 109. 40 id. 188. 43 id. 272. 24 Ind. 231.

⁶ 24 N. Y. 40. See *Infra*, § 1420.

⁷ 21 N. Y. 181.

⁸ 2 Cowen, 552. 5 Seld. 45. 12 Barb. 237. 19 Ind. 30. 24 id. 231. 18 Ill. 232.

⁹ 2 Hill. 584. See 21 Cal. 60.

¹¹ 12 Barb. 237.

¹⁰ Story on Con. § 34.

is sought to avoid a contract entered into before the day when the insanity commenced, as found by the commission, the proof lies with him who alleges it;¹ but after a general derangement is shown, it is incumbent on the one who insists that the act was valid to show sanity at the very time when it was performed, and it is then valid.² The same presumptions exist in regard to soundness of mind. 'Those who allege unsoundness must prove it.'³ In regard to insanity, erroneous, foolish, and even absurd opinions on certain subjects, do not establish it, when the person entertaining them still continues in the possession of his faculties, discreetly conducting his own business, and that of others;⁴ nor are an irritable temper and excitable disposition, of themselves, evidence of it.⁵ And perverse opinions and unreasonable prejudices are not to be confounded with mental alienation.⁶ But there may be such a persistent belief in supposed facts which have no real existence, against all reason and probability, that the person may be under such a delusion as to amount, so far as they are concerned, to insanity.⁷ Weakness of understanding of a contracting party, not amounting to absolute idiocy, is not a ground for avoiding his contracts;⁸ but it may furnish strong ground of suspicion that a fraud or imposition has been committed; and if it can be shown from the circumstances or otherwise that an undue and improper advantage has been taken in the contract, a court of law will avoid it for the fraud.⁹

§ 33. The care and custody of idiots, lunatics, persons of unsound mind and habitual drunkards was formerly vested in the court of chancery. It is now in the supreme court.¹⁰ Where, upon an inquisition taken before commissioners, one is found to belong to either of these classes of persons, the court appoints a committee of his person and estate, and thenceforth his committee being vested with the exclusive power of acting for him, all his contracts are absolutely void. The committee brings actions in his own name for all debts, or claims of the person in his charge, and under the direction of the court transacts all the business pertaining to his estate, and can

¹ 4 Cowen, 207. 46 Barb. 230. 16 N. ⁶ 33 N. Y. 619.

Y. 58. 32 id. 147.

⁷ 33 N. Y. 619. 16 Barb. 259. 27 Cal.

² 4 Cowen, 207. 1 Paige, 171. 27 Ill. 376.

395. 46 id. 258.

⁸ 3 Denio, 37. 2 Comstock, 498. (But see 25 N. Y. 9.) 36 Ill. 109. 40 id. 188.

³ 25 N. Y. 9. (See 1 Brad. 381.) 8 Ind.

411. 18 Ill. 282. 43 Mo. 127. 7 Iowa,

60.

⁴ 4 Cowen, 207. 3 Wend. 626. Shel. on Lun. 414. 2 Iowa, 111.

⁴ 21 Barb. 107.

⁵ 32 N. Y. 715.

¹⁰ 2 R. S. 52, § 1. 3 id. (Banks' 5th ed.) 134. Laws of 1864, ch. 417, p. 999.

defend any action on a contract made by him previous to the commission, by showing his idiocy or lunacy at the time.¹

§ 34. Idiots and lunatics, although not liable upon express contracts, are responsible for necessities furnished them;² and a lunatic is also answerable for articles purchased by him, before a commission, from one who was not aware of his lunacy.³ They are also at all times answerable in damages for any injury they may do to another.⁴ When sued for necessities furnished, idiots must defend in person, and the court should appoint their committee or some other person to assist in the defense.⁵ Lunatics, when sued, appear by guardian or attorney, in the same manner as sane persons.⁶ But although actions may be maintained against idiots and lunatics, the supreme court will not permit an execution to issue against their estates when in the charge of a committee, and in ordinary cases will not permit a party to bring an action against them, excepting by express permission obtained upon petition for relief.⁷

§ 35. Alien enemies are citizens of a foreign country with which our country is at war. If however they are residing in this country, their contracts are valid notwithstanding they owe allegiance to the enemy.⁸

§ 36. *Infants*, by which term are meant all persons of either sex, under twenty-one years of age, are incapable of making *express contracts* which can bind them. Their contracts, however, are not absolutely void, but voidable only at their election. The law relative to them is more fully given, *infra* sections 1013, &c.

§ 37. *The consideration of all contracts must be legal*, and all those which contravene the general policy of the common law or the provisions of any statute are void, and courts will neither aid the parties to enforce them, nor, if executed, afford relief by restoring the parties to the condition they were in before performance.⁹ The former illegality exists whenever the consideration involves an act which violates public policy or morality; as one to commit, conceal or compound a crime; for illicit cohabitation, or for the commission

¹ Laws 1845, ch. 112, § 2, p. 91. 3 R. S. ⁶ 18 John. 134. 13 Barb. 429.
(Banks' 5th ed.) 135, § 11. Supra, § 32. ⁷ 2 John. Ch. 400. 19 Wend. 649. 3

² 2 Brad. 122. Story on Con. §§ 42, Paige, 199. 2 Barb. 153. 13 id. 429. 26
&c. Parsons on id. 312. *Infra*, § 1024. id. 172.

³ 14 Barb. 488. 5 B. & C. 170. 7 Dow. ⁸ Story on Con. §§ 52, &c.
& Ry. 614. 2 C. & P. 178. ⁴ 4 Hill, 424. 3 Seld. 179. 20 Barb.

⁹ Bac. Ab. tit. "Idiots and Lunatics."
(E.) Hob. 134. 429. 17 id. 397. 12 Iowa, 398. 16 id.
49. 27 Ind. 263. 13 Minn. 59. 23 Ind.

⁵ Shelf on Lun. 395. 416. 45 Ill. 232.

of a fraud. The latter, where the act constituting the consideration is expressly prohibited, or where the prohibition is necessarily implied from the general object of the statute.¹ In such cases the presumption is that the legislature intended to make the contract void, if it contravenes the statute. The court must judge whether it is so in fact.² A party however may waive the defense of the illegality of a contract.³ If such a statute as just referred to is afterwards repealed, this repeal will not render the contract valid.⁴

§ [37*a*.] Among those special agreements which are void, as contravening the common or statute law, some of which cannot be classed under any of the general heads in the succeeding sections, may be noticed, among others, agreements by a debtor to deprive his creditors, then existing or subsequent ones, of his earnings, by contracts to labor for another, the debtor, however, retaining and using the earnings for his own advantage;⁵ the sale of a pretended title to land;⁶ for lobby services before the legislature;⁷ for the sale of property intended by both parties to be used in violating the law;⁸ all contracts by which one promises to pay a portion of the fees to another for his aid or influence in procuring an appointment to office;⁹ or to withdraw opposition to the discharge of his debtor as a bankrupt;¹⁰ all agreements for influencing the action of public officers on questions coming before them;¹¹ those by the lessee of a hotel to lease to another the bar of the hotel, and to sell him the right to sell liquors under the vendor's license.¹² So also an agreement that the surety in a guardian's bond shall hold the property of the ward for his indemnity;¹³ or that a person shall be paid a stipulated sum for giving testimony, on the condition that it leads to a favorable or satisfactory result to the other party, who is also a party in the suit,¹⁴ and so in similar cases.¹⁵ But a contract between a railroad company and a gratuitous passenger, by which the corporation is exempted from liability, under any circumstances, for damages for the negligence, however gross, of its agents, is not void as against

¹ Story on Con. § 458. Chitty on Con. 579, &c. 11 Iowa, 133. 7 Ind. 132. ⁵ 4 Kern. 162. 23 Barb. 604. Also, 16 N. Y. 508. 4 E. D. Smith, 570.

11 Wis. 394.

² 1 Kansas, 226. 14 Ohio, N. S. 331.

³ 4 Keyes, 208. *Infra*, § 50.

⁴ 47 Maine, 58.

⁶ 14 Barb. 85.

⁸ 20 Barb. 429.

⁷ 21 Barb. 361. 34 *id.* 533.

⁹ 4 Comstock, 449. 44 Ill. 113.

¹⁰ 3 Seld. 176.

¹¹ 32 Barb. 518. 3 Duer, 103. 24 Ill. 614.

¹² 46 Barb. 616.

¹³ 9 Bosw. 232.

¹⁴ 9 Bosw. 116.

¹⁵ See 1 Minn. 230. 20 Cal. 182. 15 *id.* 387. 13 Ohio, N. S. 228.

public policy, though one for its own negligence would be;¹ nor is one for procuring papers, furnishing information or memoranda, procuring evidence or making arguments before the legislature or its committees in regard to matters properly before them.² A clause in an agreement providing that all disputes relative thereto shall be settled by a person then agreed on, as, in a building contract, that questions arising thereunder shall be adjusted by the architect, is void, as against public policy.³

[§ 37b.] But there are cases where, although the transaction is an illegal one, the law will give relief to one of the parties. Such are cases of usury, gaming, sales of lottery tickets, and similar transactions, the rules as to which are clearly laid down in *Schermerhorn v. Talman*.⁴

[§ 37c.] Questions sometimes arise in cases where either the consideration is illegal in part only; or, the consideration being legal, the promise or promises founded thereon are illegal in part. The rule in these and similar cases is not always clear, nor laid down with precision, but it seems to be well settled that if any part of the consideration is illegal, the whole of it, and the agreement thereon founded is void. But if the consideration is a good and valid one, and thereupon another promises to do two things, one legal and the other illegal, he shall be held to do that which is legal, unless the two are so mingled and bound together that they cannot be separated, in which case the whole agreement is void.⁵

To the same extent, all contracts growing out of, or connected with any prior illegal or immoral contract, or transaction, are void.⁶

§ 38. The law will always permit a defendant in an action upon a contract to show the illegality of its consideration, although it may be in writing, or even under seal, and this, notwithstanding the general rule, that no parol evidence can be received to contradict, add to or vary the provisions of a written agreement between the parties to an action.⁷ The presumption in all cases, where it is not void on its face, is in favor of the agreement; and where it is susceptible of two meanings, the one legal and the other illegal, in the absence of proof to the contrary, the interpretation which renders it legal is to be

¹ 24 N. Y. 181. Id. 196. *Infra*, § 106, a. 17 Barb. 397. 21 id. 361. 34 id. 533. 46

² 4 Kern. 289. 34 Barb. 533. 5 Wis. id. 616. 15 Cal. 387. 29 id. 267. 34 id. 200. 36 Ill. 458. 24 Ind. 395. 25 id. 31.

³ 39 N. Y. 377.

⁴ 4 Kern. 93, 123. See also id. 162.

⁵ 21 Barb. 361. 17 id. 397.

⁶ 34 Barb. 533. Chitty on Con. 580. 23

⁷ 1 Parsons on Con. 389. 3 Comstock, 37. Ind. 590.

preferred.¹ And in all cases, the illegality, must be distinctly shown either from the terms of the instrument or other proof, or the contract will be sustained. This other proof may be made, among other ways, by showing the declarations and admissions of the parties, or their acts and proceedings under the contract, giving it a practical construction.²

§ 39. By a statutory provision it is made lawful for an injured party to compound and settle with any person bound by recognizance to appear, or who is in prison on a charge for an assault and battery or other misdemeanor, for which such injured party has a remedy by civil action, unless it was an assault and battery or other misdemeanor committed by or upon an officer or minister of justice in the execution of the duties of his office, or riotously, or with an intent to commit a felony.³ In such a case a contract will be valid.

§ 40. But where I request another to do an act which in fact amounts to a trespass, and agree to indemnify him for doing it, if he at the time does not know it to be a trespass, my promise of indemnity is good. As where I direct an officer to levy an execution in my favor upon certain property, which happens to belong to another person than the defendant in the execution; or where I direct my agent to take possession of a fishing ground in possession of another;⁴ or where a highway commissioner directs one to remove a turnpike gate which he believes to be a nuisance.⁵ In these cases the promise is invalid if it appear that the promisee knew the act to be a trespass and illegal.⁶ This promise of indemnity will be implied by the law, if an express one is not given.⁷

§ 41. The promise of indemnity mentioned in the preceding section, includes an authority to the promisee to employ and indemnify agents to do the act, and any damages he may be compelled to pay for their acts in performance of the request may be recovered by him from his principal upon his promise of indemnity, as well as such damages as he may have to pay directly for his own acts.⁸

§ 42. Of the class of contracts void as founded upon an immoral consideration, are all those which have a tendency to promote licentiousness; as for the payment of the board of a woman where the

¹ 34 Barb. supra. 53 id. 276. Chitty on Con. 581.

² 34 Barb. supra.

³ 2 R. S. 730, §§ 66 to 69. 3 id. (Banks' 5th ed.) 1021, 2, §§ 70, &c.

⁴ 9 Cowen, 154. 24 N. Y. 191.

⁵ 17 John. 142.

⁶ 17 John. 142. 9 Cowen, 154. 14 Abbott, 144.

⁷ 4 Kernan, 332-3. 15 Barb. 348-9.

⁸ 9 Cowen, 154.

purpose was to favor an illicit intercourse with her; for the hiring of a house or lodgings for purposes of prostitution;¹ for the printing and sale of indecent books or pictures;² for the use of gaming apparatus at a place where gaming is prohibited;³ for the printing or publishing of libels.⁴ Agreements to fight, and the like, are also within this class of contracts.⁵ The law will not presume that the consideration is an immoral one, as that a promise to pay for the board of a woman is for the purpose of illicit intercourse; that purpose, if it exists, must be clearly proved, and is not to be inferred from past cohabitation alone.⁶

§ 43. Contracts to pay for past seduction or past cohabitation are, however, excepted from the rule, their object being deemed the redress of the injury suffered by the woman.⁷ And an action for clothes sold to a prostitute, cannot be defeated by showing that the plaintiff knew her character, although, from the nature of the articles, the use to which they would be applied might have been known to him; to render the contract illegal, the clothes must have been sold or the lodgings let for the purpose of enabling the defendant to carry on her business of prostitution.⁸ An agreement to pay for the washing of the clothes of a prostitute (although they are to be worn in her business) is good.⁹

§ 44. Although a contract made to indemnify one against the consequences of thereafter committing an immoral or illegal act will be void, yet a contract to indemnify one against the consequences of one already done is valid.¹⁰

§ 45. Contracts for trading with an enemy (although suit is not brought on them until after the war has ceased),¹¹ for the prevention of the course of justice,¹² and buying and selling offices,¹³ are void as contrary to public policy. Formerly, the officious assisting one to prosecute or defend a suit at law, called *maintenance*, or the purchase

¹ 5 Cowen, 253. 4 Denio, 444.

⁸ See note (6) supra. Also 1 Camp, 348.

² 4 Esp. 97. 2 C. & P. 198. Sess. Laws of 1868, 856, ch. 430.

2 C. & P. 347.

⁹ 1 Bos. & P. 340.

³ 13 John. 85. 1 R. S. 661, § 4. 2 id. (Banks' 5th ed.) 923.

¹⁰ 1 Caines, 450. 14 John. 378. 2 Hall, 579. 13 Barb. 365.

⁴ 2 C. & P. 198.

¹¹ 16 John. 438.

⁵ Chitty on Con. 593.

¹² 37 Barb. 343. 13 Ohio N. S. 228. 40

⁶ 5 Cowen, 253. Supra, § 38. See also as to immoral contracts 24 Ind. 115.

Mo. 67. 27 Ind. 498.

⁷ 5 Cowen, 253. 4 Denio, 439. 13 Barb.

¹³ 2 R. S. 696, §§ 35, 36, 37. 3 id. (Banks' 5th ed.) 977, §§ 37, 38, 39.

92. See, however, as to cohabitation, 4 B. & Al. 650.*

of a suit or right of action to prosecute, called *champerty*, were also void for the same reason. But even then, it was lawful for a man to assist his near relative, his servant or a poor neighbor to prosecute a suit.¹ The Revised Statutes have repealed some of the old rules relative to these questions; and it is now probable that, in New York, not a vestige of the law of maintenance or champerty exists, except the prohibitions against taking conveyances of lands in suit, buying or selling pretended titles, and conspiracies falsely to move or maintain suits.² Attorneys may make agreements with their clients to receive a part of the recovery towards their compensation.³

[§ 45a.] We have just referred (section 45) to the law against selling office. Another statute (2 R. S. 286, § 59),⁴ prohibits any sheriff or other officer taking any bond, obligation or security, by virtue of his office, in any other case or manner than allowed by law, and makes all such bonds, &c., void. It is held not to be a violation of either of these statutes for a sheriff to make an agreement with a deputy to receive a portion of his fees.⁵ This last statute only prohibits those securities which are taken under mere *pretense of authority*, or *corruptly*, and not such as are allowed by common law or some statutory provision.⁶

§ 46. Contracts in restraint of marriage, or by which one undertakes to induce another to marry, are void, as against the policy of the law, which is to encourage marriage, and also to leave marriage engagements to be formed free from the bias of fraud or interest.⁷

§ 47. Contracts in restraint of trade, which prohibit a party from the pursuit of a particular occupation, or the carrying on of a particular business in any place in the state, are void, as injurious to the public, and against public policy. But where the restraint is *limited*, as that one will not exercise his trade or carry on his business in a particular place, or within reasonable limits, the contract will be upheld if it appear that in addition to the pecuniary consideration for the restraint, there was some *good reason* for the contract, and that it imposes no restraint upon one party, which is not beneficial

¹ 3 John. Ch. 508. 3 Cowen, 623. 5 Denio, 308. 4 Bl. Com. 135. See 27 Ind. 263. 25 Iowa, 487.

² 4 Kern. 289. 4 Duer, 275. 2 R. S. 691, 2, §§ 6, 7, 8. 3 id. (Banks' 5th ed.) 972.

³ 23 Barb. 420.

⁴ 3 R. S. (Banks' 5th ed.) 476, § 48.

⁵ 1 Hill, 21. 6 Paige, 68.

⁶ 23 Wend. 606. 16 N. Y. 442. 18 id.

⁷ 1 Pars. on Con. 536, 556. 8 Wend. 290.

to the other.¹ What are good reasons, or reasonable limits, must depend upon the nature of the trade or business to which the contract relates.² As a general rule it has been laid down that the law will not allow any one, for any time, however short, to preclude himself from serving the public in any business, or in any territory however limited, unless the obligee intends to and can supply his place.³

§ 48. The rule being thus indefinite, no precise boundary can be laid down for determining whether contracts for a limited restraint of trade are within the policy of the law. If the contract contains a restraint far larger than is necessary to protect the plaintiff from interference in his trade or business, no action can be sustained upon it.⁴ Under this and the other rules above given, many decisions have been made, sustaining or disapproving particular agreements; it is unnecessary as it would be impossible to refer to them all, or to attempt to deduce a more specific rule from them. Many are found or are cited in the cases referred to in the margin, and must be themselves examined when any new case arises.

§ 49. Agreements with a public officer for him to neglect his duty, as for instance to suffer his prisoner to escape;⁵ that he will not arrest one on process,⁶ or having taken him, to let him go on a promise to pay him the money or surrender himself by such a time,⁷ are void.⁸

§ 50. Contracts and securities on account of money or property wagered, bet or staked,⁹ in violation of the laws against lotteries,¹⁰ or the racing of animals;¹¹ for the sale of liquor contrary to the excise laws;¹² for the sale of merchandise, or the doing of any act forbidden

¹ 7 Cowen, 307. 21 Wend. 157. 6 5th ed.) 924. 1 Comstock, 411. 15 N. Y. Seld. 241. 23 Barb. 633. 2 Ohio N. S. 524. 20 id. 9. 19 Barb. 122. 6 Cal. 359. 519. 3 id. 274. 11 id. 349. 6 Cal. 258. 11 id. 343. 4 Mich. 329. 6 Wis. 468. 4 6 Ind. 200. 11 id. 70. 3 Chand. 133. 3 Kansas, 94. 1 Minn. 94. 10 Ind. 161. Greene, 596. 4 Kansas, 159. 18 Wis. 11 id. 59. id. 447. 13 id. 178. 6 Clarke, 394. 7 id. 17. 23 Ill. 493. 26 id. 404. 27 id. 320. 33 id. 349. 36 id. 544. See 1 Oregon, 281.

² 9 How. Pr. R. 335.

³ 10 Barb. 641, 651.

⁴ 6 Seld. 241. 9 How. Pr. R. 335. 6 Ad. & E. 445. ¹⁰ 1 R. S. 665, §§ 24, &c. 2 id. (Banks' 5th ed.) 929, §§ 32, &c. 5 John. 327. 10 Ind. 404. Id. 438.

⁵ 4 Mass. 370.

⁶ 5 Mass. 385.

⁷ 5 Mass. 541.

⁸ 7 Greenleaf, 113. 8 John. 198. 8 East. 171. ¹¹ 1 R. S. 672, §§ 55, &c. 2 id. (Banks' 5th ed.) 932, §§ 49, &c. 20 Ill. 215.

⁹ 1 R. S. 662, §§ 8, &c. 2 id. (Banks' &c. 2 R. S. (Banks' 5th ed.) 941, §§ 11, &c.

by statute to be done on Sunday,¹ are void, as contravening the provisions of a statutory enactment. In regard to the observance of the Sabbath, it is held that all business transactions are valid, except so far as prohibited by this statute, and judicial proceedings which are void at common law;² that a carrier is liable for property lost, though the contract was made and the property delivered on Sunday, there being no obligation to transport it on that day;³ that it is not a violation to preserve property on that day, if exposed to imminent danger;⁴ nor to make a private sale of a span of horses; or any other mere bargain⁵ not violating the day nor intended to; the delivery on that day of a deed previously executed will pass the title;⁶ but a contract for the publication of an advertisement in a newspaper to be issued on Sunday,⁷ or for the hiring of horses and carriage with the knowledge that they are to be used on that day for riding for pleasure, are void;⁸ and so, in some of the states, swapping horses, selling property, giving a promissory note or deed,⁹ and for all other servile work, except that of "necessity or charity;" unless it be shown that the parties observed another day as the Sabbath.¹⁰ In the legal estimation, Sunday continues from midnight to midnight in this state, though in Connecticut it is held to last only from sunrise to sunset.¹¹ But these Sunday contracts may afterwards be ratified on a week day and then they are good. Merely returning the property received however is not a ratification.¹² In Indiana, it is held that a sale of property to be used in gaming, and that to the vendor's knowledge, is not void.¹³

§ 51. Contributions of money to promote the election of any person or ticket are, except when intended to defray the expenses of printing and the circulation of votes, handbills and papers previous to an election, forbidden by statute.¹⁴ Under this prohibition it was

¹ 1 R. S. 675, §§ 69, &c. 2 id. (Banks' 5th ed.) 935, §§ 65, &c. Laws 1869, ch. 909, § 11. 3 Wis. 343. 26 Ind. 499. 25 id. 503. 2 Oregon, 190. 14 Mich. 287. 16 Iowa, 49. 40 Mo. 555.

² 8 Cqwen, 27. 31 Barb. 38. 31 Ill. 469. See 26 Cal. 514.

³ 29 N. Y. 115.

⁴ 22 Barb. 539.

⁵ 13 Wend. 425. 44 Barb. 618. 4 E. D. Smith, 234. 2 Ohio N. S. 387. Aliter 9 Minn. 194.

⁶ 27 Penn. 90. 44 Maine, 28.

⁷ 24 N. Y. 353.

⁸ 46 Barb. 59.

⁹ 10 Ind. 386. 9 id. 112. 4 id. 619, 13 id. 565. 25 id. 503. 12 Mich. 378. 8 Minn. 41. 9 id. 194.

¹⁰ 1 Hill, 76. 2 Sand. 318. 4 Ohio N. S. 566. 16 Iowa, 49. 31 Ill. 469.

¹¹ 15 John. 177. 8 Barb. 384. 1 Root, 145. 2 Conn. 541.

¹² 25 Ind. 503. 26 id. 499. Supra, § 37.

¹³ 24 Ind. 1.

¹⁴ Laws of 1842, ch. 130. 1 R. S. (Banks' 5th ed.) 448, § 6.

held that a contract to build a log cabin to accommodate political meetings during an election canvass, to aid the success of a party, was illegal and void.¹ This judgment was afterwards affirmed by a tie vote,² but has never entirely satisfied the profession. A subsequent case has held that it should not be extended, and that an action may be maintained for services rendered for another, under a contract, in putting up and taking down a tent used by the employer as a place for holding political meetings previous to an election.³

§ 52. Usurious agreements which, in New York, include all bonds, bills, notes, assurances, contracts or securities (except bottomry and respondentia bonds and contracts), and all deposits of goods or things whereupon or whereby there shall be reserved or taken or secured, or agreed to be reserved or taken, any greater sum or value for the loan or forbearance of money, goods or things in action, than at the rate of seven dollars for the hundred for a year, are by statute declared void.⁴ While the defense of usury is a legal one, it is called "unconscionable,"⁵ and is not encouraged.⁶ Parties alleging it were formerly held to great strictness in pleading it,⁷ but since the Code, the same rules of pleading apply to this as other defenses.⁸ But the right to insist upon it is one personal to the borrower, or his sureties, heirs, devisees or personal representatives.⁹ An indorser, in a suit against him by an indorsee, cannot allege that his indorsement was void for usury between him and another person.¹⁰ By a statute of New York, corporations, including associations and joint stock companies having any of the powers and privileges of corporations, cannot interpose this defense.¹¹ This statute prohibits these corporations, &c., from recovering back money paid in excess of legal interest, and applies to their sureties as well as to themselves.¹²

§ 53. This statute applies only to loans of money, or of something to be returned *in kind*, and not where the thing itself is to be returned. Thus, a loan of wheat, to be repaid by other wheat of equal or greater value, with more than seven per cent interest would

¹ 5 Hill, 27.

² 7 id. 387.

³ 28 Barb. 109.

⁴ 1 R. S. 772, §§ 2, &c. 3 id. (Banks' 5th ed.) 72.

⁵ 9 Cowen, 66.

⁶ 3 Wend. 573.

⁷ 4 Paige, 526. 3 Wend. 573.

⁸ 1 Kern. 368. 48 Barb. 256. But see 21 N. Y. 567.

⁹ 5 Seld. 73. 30 N. Y. 197. 33 id. 31. 37 id. 224. 1 Transcript, 262, and refs. 26 Barb. 635. 30 id. 626.

¹⁰ 28 N. Y. 481.

¹¹ Laws of 1850, ch. 172, p. 384. 3 R. S. (Banks' 5th ed.) 75, § 19.

¹² 23 N. Y. 275. 33 id. 665. 30 Barb. 626.

be usurious. But the loaning of a horse or other property for whatever compensation, or a loan of five bushels of wheat to receive ten after harvest, is not usurious within the statute.¹ The general doctrine is, that where the contract is clearly for the repayment of a *greater value* than the amount of the loan and the lawful rate of interest it is usurious, and that it is not sufficient that the repayment is to be of a greater quantity of the same article, which may or may not, from the fluctuations of trade, be worth more or less than the loan.² Thus, a sale of cows on a contract to return double the number and description at the end of four years, or of sheep to double in three years, was held not usurious;³ so where one let sheep to another to return in one year an equal number of the same age and quality, to pay fifty cents each for their use, that being more than seven per cent on their value, it was held the agreement was not of itself usurious, and presented a question of fact whether it was made with intent to avoid the statute or not.⁴

§ 54. A loan of money to be repaid upon the happening of an uncertain event, with a charge of more than seven per cent, is not usurious, if the risk is a part of the contract and one of its essential features.⁵ As if the loan is to be paid on the return of a ship, or the death of a certain person. The hazard must be *real* and must extend to the principal as well as the sum to be paid for its use, and a slight hazard or contingency will not be sufficient to take the case away from the operation of the statute; as where A loans B £100 to be returned in one year, and with £20 for the use of it if the son of A be then alive, for the uncertainty of the life of A's son is too slight.⁶

§ 55. A contract for the loan of money made in a foreign country or state where the laws permit a greater rate of interest, is valid and may be enforced here if it were valid and enforceable where made.⁷ But where a contract is made in one country to be executed in another, the rate of interest is to be governed by the laws of the country where it is to be performed, and the contract will be void or not as it is in contravention or accordance with its laws.⁸ But where a contract is made which is in violation of the usury laws of the state where it is made, it is void elsewhere, unless it was made in the con-

¹ Ord. Usury, 26, 28. 5 Cowen, 149, note. 3 Comstock, 344, 355. 1 Seld. 315. Kirby, 260.

² Kirby, 260. 5 Cowen, 149, note. 1 Seld. 315. 4 Kernan, 120.

³ 5 Cowen, 144, 149, note.

⁴ 17 Wend. 280. 1 Seld. 315.

⁵ Ord on Usury, 24, 25 and 39 to 48.

⁶ Com. on Usury, 39, 40. See 2 Paige, 267. 1 Sand. Ch. 203. 22 Barb. 118.

⁷ 22 Barb. 118, 128. 45 id. 340.

⁸ 22 N. Y. 472. 30 id. 264. 22 Barb. 128. 26 id. 208. 38 id. 352.

summation of an agreement entered into in a state where the interest reserved was lawful, in which case it is valid.¹ If made and payable in one state, but negotiated in another, the law of the place where made and payable governs.² The usual presumption that the law of a foreign state or country agrees with that of the place of suit, does not always exist in usury cases. The party insisting on the usury must, if the contract was made elsewhere, allege and prove that the interest agreed for was forbidden by the law of the state under which the contract is to be construed.³ But, if a bond and a mortgage on lands in Wisconsin, is given in another state, where it would be void for usury, and suit is there brought, the plaintiff must prove that it was valid in Wisconsin.⁴

§ 56. An agreement to pay a certain sum in gross if the principal be not paid at the time appointed, or a certain sum per annum beyond, seven per cent until the principal be paid, by which the debtor may discharge himself of the extra payment at any time, is not usurious.⁵ As if I agree to pay "sixteen dollars extra" if I do not pay eight hundred dollars by a certain time;⁶ or, where I owe £80, and give my note for £87 36s. payable in four quarterly installments (being the amount of principal and interest at the last payment), and if any installment is not paid, the whole is to become due; this is not usurious and the whole may be collected if any installment is not paid.⁷

§ 57. To constitute usury, both parties must intend to provide for the payment of more than the legal rate of interest.⁸ The reservation of more by accident, or mistake, or with the knowledge of but one of the parties, is not enough, even where the lender, after advancing the money but before receiving his security, discovers the mistake.⁹ But where a bank adopted an erroneous method of computing interest which gave it more than the legal rate, it was held usury.¹⁰ Where the excess taken is trifling, it will be presumed taken by mistake and not by an erroneous rule of calculation until the latter be shown.¹¹ If there is no usurious agreement, the question of an usurious intent is immaterial.¹² But if there is such an agreement, inten-

¹ 1 Paige, 220.

² 1 Seld. 178. 30 N. Y. 259.

³ 2 Seld. 124. 22 N. Y. 472. 22 Barb. 129.

⁴ 46 Barb. 272. And see 1 Kern. 437.

⁵ Ord. on Usury, 53, &c. Com. on Usury, 73, 74. 22 Barb. 124.

⁶ 29 N. Y. 337.

⁷ 4 Moore, 78. S. C. 1 Brod. & B. 447. And see 28 Barb. 29. 37 id. 60.

⁸ 19 John. 496. 1 Keyes, 191. 2 id. 506. 41 Barb. 359.

⁹ 2 Vent. 83. 2 Kern. 231. 31 N. Y. 66. 32 Barb. 560 refs.

¹⁰ 2 Cowen, 678.

¹¹ 1 Barb. 432.

¹² 31 N. Y. 66.

tionally made, the contract is void, whether the parties act in ignorance of the law or not.¹

§ 58. Where the contract is for receiving more than the legal rate of interest, it is immaterial whether the premium be money or any other thing, and whether it is actually paid or only promised to be paid, or whether one note or obligation be taken for the principal lent, and another or a parol agreement is made for the usury. In all these cases the contract is void, and all the securities taken are infected with the usury.²

§ 59. A note for the payment of a particular sum with interest from a day anterior to its date, in itself affords no evidence of usury;³ nor would a reservation of interest quarterly, or half yearly, or the taking of the interest in advance, be usurious.⁴ And in computing the interest in advance, the three days of grace may be included.⁵ So the including in a note, compound interest on a previous account or demand;⁶ or simple interest in a note given for a demand not legally bearing interest;⁷ or including the usual difference of exchange between the place where the payer resides and the note is to be paid, or letting the borrower have uncurrent money, at his request, and as being equally as good for his purposes as current funds⁸ is of itself no evidence of usury.⁹ Where, however, it is made so payable merely to afford the lender a greater rate of interest, it is usurious.¹⁰ The intention in such cases is a question of fact.

§ 60. Where a note was not made upon an usurious contract, the payee or indorsee who owns it may sell it at a discount at a rate above seven per cent., and the purchaser may collect it.¹¹ And where two persons exchange their notes, of equal amounts, for the purpose of raising money upon them, and one negotiates the note received by him at a discount beyond the legal interest, the note is not usurious.¹² The reason is, that each gave his note to the other upon a good consideration, and the note he received is a valid security in his hands to dispose of. But if, at the time the notes were exchanged, it was contemplated by the parties and the purchaser that they should be sold at an unlawful discount, they would be usurious;¹³ and so if the

¹ 31 N. Y. 473. 34 Barb. 171.

² 2 Keyes, 506.

³ 9 Cowen, 65. 13 Wend. 505. 12 Barb. 360.

⁴ 10 Wend. 116. 19 N. Y. 134. 33 id. 613. 46 Barb. 98.

⁵ 8 Wend. 533. 1 Barb. 235.

¹⁰ 33 N. Y. 55. 46 B. 98.

⁶ 3 Wend. 408. 5 Paige, 98. 2 Kern. 223.

¹¹ 7 Wend. 256. id. 569.

⁷ 2 Cowen 664. Id. 678.

¹² 6 Seld. 198. 34 Barb. 157. 4 Duer, 358. 6 id. 532.

⁸ 1 Barb. 627. 3 id. 222.

⁹ 6 Seld. 202.

¹³ 11 Paige, 660.

securities exchanged are of unequal values, arising from differences in their amounts or otherwise, so that one gains an advantage over and above seven per cent, they are usurious and void.¹

§ 61. Where the holder of a mortgage not yet payable offered to the mortgagor to make a discount for immediate payment, and the mortgagor being unable to raise the money, agreed with another to raise it and take an assignment, and have part of the discount as compensation for raising the money, it was held the agreement was not usurious, and that a new security given for the amount paid by the assignee, and his share of the discount, was valid, and this though it was a part of the agreement that the new mortgage for those amounts should be given.²

§ 62. Where a promissory note is made, to be discounted either for the maker or for some one to whom he has lent his name, and is what is called accommodation paper, it has no legal inception until it is negotiated; and if it is negotiated at a rate of interest greater than seven per cent, it is usurious. It will make no difference if it were made or indorsed with a view to being discounted at a legal rate, nor that the loan was made by an agent of the lender; in either case the note, taking effect in the first instance under an usurious contract, is void, even in the hands of a bona fide holder.³ But if, in this and similar cases, the maker gives a certificate, or otherwise represents that the paper is valid, or given for value, and it is thereupon purchased in good faith by a third party, at a discount exceeding seven per cent, he is *estopped* from alleging usury,⁴ provided the certificate or other representation is outside of the face of the paper itself.⁵ But a distinction is here to be taken between these cases, and those where a person, for a consideration, by way of commission or otherwise, sells his credit to a third person; as if he indorses a note for a certain per cent on its amount, or guarantees it. In these and similar cases, which are called a sale of one's credit, the transaction, if bona fide, and unconnected with a loan between the parties, is valid, though otherwise usurious.⁶ Neither is it usurious, *per se*, for a factor to charge a percentage for sales or for advances.⁷

§ 63. A creditor is not allowed as a condition of a loan, except in

¹ 4 Kern. 93, 120, 121. 34 Barb. 157. 6 Duer, 582, and refs.

² 4 Paige, 526. 35 N. Y. 494.

³ 8 Cowen, 669, 686, 690. 4 Kern. 93. 36 Barb. 585. 5 Duer, 468. And see also 1 Kern. 368. 2 Duer, 52. 2 Conn. 175.

⁴ 26 Barb. 611, and refs. Also 3 Keyes, 609.

⁵ 22 N. Y. 312.

⁶ 31 N. Y. 611, and refs. S. C. 4 Bosw. 320, and refs. 4 Coms. 363. 21 N. Y. 531. 37 id. 356. 1 Edmonds' Sel. Cas. 371.

⁷ 27 N. Y. 137.

special cases, to receive a compensation for his services in procuring the money;¹ but one who acts as agent for the maker in procuring a loan may accept a compensation notwithstanding he be the payee of the note.² Neither may a creditor make it a condition of the loan that the borrower shall purchase a certain article, if the condition is intended to furnish a greater compensation for the loan than the legal rate of interest; if it does it infects the transaction with usury.³ If an agent falsely represents himself to be the principal in loaning the money, and takes usury, this is not such usury as will avoid the security if the real party was innocent and did not take usurious interest himself.⁴

§ 64. All promises, agreements and contracts, by which it is attempted to provide for the payment of more than the legal rate of interest, being void, the question whether the parties intended to evade the statute, is one of fact, to be determined from the circumstances of the case.⁵ If a real loan or forbearance on usury was intended, no matter how subtle the invention to disguise it, all the instruments affected by it are void. Among the numerous pretenses which have been resorted to to cover usury, are the adding a colorable risk, as making the payment depend on the life or death of some person, the lending money coupled with a sale of goods at an inordinate price, the lending stock and charging interest beyond its market value, the advancing money on a pretended partnership and receiving usury under the head of partnership profits, the reserving interest as rent on a lease to the borrower, at a high rent. In these cases, the intention may be ascertained from the slightness of the hazard where the loan is put at hazard, overtures for a loan, the exorbitance of the price of goods upon a sale coupled with the loan, the price paid on a repurchase where goods have been sold at a price and then repurchased for cash, the reservation of a right to repurchase, the distress of the borrower, the form of the security, and the contemporaneous and subsequent acts of the parties. In each case, the circumstances are to be weighed and the question carefully determined, whether there has been an attempt to evade the statute.⁶ This question is

¹ 1 John. Ch. 6. 38 N. Y. 281. 2 Keyes, 33 Barb. 350.

² 5 Wend. 181. 21 N. Y. 219. 32 id. 105. 33 Barb. 350.

³ 1 John. Ch. 536. 7 John. 196. 4 Kern. 115, 116.

⁴ 2 Keyes, 543.

⁵ 2 Keyes, 506.

⁶ See, for cases bearing on these and similar questions, as to what is or not usury, many of the cases before cited, and also, 3 Comstock, 344. 4 id. 363. Id. 463. Id. 225. 27 N. Y. 137. 32 id. 605. 33 Barb. 77. 35 id. 44.

one for the jury. If the usurious agreement is made by several, either defendant when sued may set up the defense.¹

§ 65. A judgment obtained by a regular proceeding upon a contract which was usurious is valid,² and any security given thereon is valid.³ But if the judgment be obtained by confession upon an usurious consideration, in the supreme court, or a court having power to vacate its own judgments, upon motion or by a suit brought, it might be set aside.⁴ If the confession is in a justices' court and the judgment be docketed, it would become a judgment of the county court, and be subject to its power of vacating it.⁵

§ 66. Where a contract is not usurious in its inception, a subsequent agreement for forbearance upon any usurious consideration does not affect the original contract.⁶ That remains valid, and the usurious agreement only is void. And where the valid contract is taken up and an usurious one given in its place, the latter being void the original contract remains in force, and an action can be maintained upon it.⁷

§ 67. A subsequent security taken as a substitute for an usurious contract or any part thereof, or as collateral thereto, is void,⁸ unless when it is given upon an arrangement to cancel all the usurious features of the first, and to enter upon a new contract free from usury.⁹ As where A borrows of B one hundred dollars upon an agreement to pay interest at the rate of ten per cent. If a new note is given at the end of the year for one hundred and ten dollars, it is infected with the original usury. But if, after the note is made, A and B agree to substitute a note for one hundred dollars with lawful interest and cancel the first, the new note is valid.¹⁰ But, if a *bona fide* holder of such paper, without notice of the usury, until after he received it, takes a new valid security therefor, this cannot be avoided for the original usury.¹¹ And this is so whether the holder paid money for it or took it for an antecedent debt.¹² The possession of negotiable paper is, in such a case, presumptive evidence that he is a *bona fide* holder, and before maturity.¹³ If the usurer receives an

¹ 15 Iowa, 49.

² 1 Comstock, 274.

³ 2 Caines, 150.

⁴ 2 John. Cases, 258. S. C. 1 John. 531, note. 5 John. Ch. 122, 141, and refs.

⁵ Code, § 63.

1 Com. 274. 41 Barb. 359.

⁷ Ord on Usury, 130, &c. 1 Coms. 274. 36 N. Y. 520. 37 id. 353. 39 id. 325. 41 Barb. 359. 17 Wis. 383.

⁸ 9 Cowen, 647. 33 N. Y. 55. 5 Transcript, 61. 35 Barb. 96. 46 id. 272. 4 Bosw. 573. 3 Term. R. 537. Com. on Usury, 183. 45 Ill. 178.

⁹ 13 Wend. 505. Clarke, 76. Id. 252.

¹⁰ Com. on Usury, 183, 184.

¹¹ 8 Cowen, 669, 691. 1 Barb. Ch. 43. 2 Sand. 85.

¹² Hoffm. 291.

¹³ 3 Sand. Ch. 320. 2 Sand. 85.

obligation in payment of a demand, he cannot afterwards avoid that payment by alleging that the obligation was usurious and therefore void;¹ but if a borrower on usurious terms assigns to the lender, bonds and mortgages, in payment of the loan, the assignment is void, and the borrower may immediately maintain trover for them.²

§ 68. Justices of the peace and constables are prohibited from buying or being interested directly or indirectly in buying any bond, note or other demand or cause of action, for the purpose of commencing any suit thereon before a justice, and from lending or advancing, or agreeing to lend or advance, or procure to be lent or advanced, any money or other valuable thing, to any person in consideration, or as a reward for or inducement to the placing or having placed in their hands any debt, demand or cause of action for prosecution.³

§ 69. The statute provides that "in any suit to be brought in any action of debt, covenant or assumpsit, the defendant may give notice with his plea, in addition to any other matter of defense, that on the trial of the cause he will insist and prove that the demand on which such action is founded has been bought and sold or received for prosecution contrary to law, without setting forth any other particulars."⁴ This provision in relation to the manner of pleading is supposed to be repealed by section 140 of the Code of Procedure, by which all the forms of pleading theretofore existing are abolished.⁵

§ 70. The statute further provides, that in such a suit the defendant may, two days before the trial, serve a notice on the plaintiff, requiring him to appear to be examined, and in case he fails to attend, without an excuse satisfactory to the court, he shall be non-suited. If his absence shall be satisfactorily accounted for, the court shall postpone the trial, on the plaintiff's payment of costs; and if he does not appear at the day to which it is postponed, he shall be non-suited. If the plaintiff appears, he is entitled to witness' fees, and he is not bound to appear except from the county in which the cause is tried, or an adjoining one. On the trial the plaintiff may be examined on oath touching the matters set forth in the notice, and if he refuses to answer any questions pertinent to show a violation of this statute, or if, on the trial it appears that the plaintiff's cause of action has been bought or procured contrary to it, the plaintiff

¹ 5 Seld. 241.

² 2 Seld. 107.

³ 2 R. S. 267, § 235. 3 id. (Banks' 5th ed.) 454, § 161.

⁴ 2 R. S. 268, § 237. 3 id. (Banks' 5th ed.) 455, § 163.

⁵ See 4 E. D. Smith, 234.

shall be non-suited, and his evidence may not be used in any indictment against him for a violation of this statute.¹

§ 71. The notice to attend the trial may be in the following form :

Justice's Court. Before Hiram Briggs, Esq. one of justices of the peace of Chenango county.

Richard Roe
agt.
 James Jackson. }

Sir: Take notice that you are hereby required to appear personally on the trial of this cause, on the 7th day of June next, at one o'clock, P. M., at the office of the above named justice at Sherburne, to be examined pursuant to the provisions of article 13, title 4, chapter 2, part 3 of the Revised Statutes. Dated June 1, 1869.

Yours, &c.

JAMES JACKSON,

Defendant in the cause.

To Mr. Richard Roe,

Plaintiff in the cause.

It should be delivered to the plaintiff personally, if he can be found at his place of residence. If not, it would probably be sufficient to leave it at his dwelling-house, with some member of his family of sufficient age and discretion to be charged with its delivery to him on his return. The two days service is to be computed by including the one on which it is served, and excluding that of the trial. Thus a notice for a trial on the seventh of the month, may be given on the fifth, unless Sunday intervenes, when it must be on the fourth.² This is the rule except where a thing is required to be done a certain number of days before a given day, and then both days are excluded.³

§ 72. *Duress* by imprisonment or threat avoids all contracts. The first is where one is unlawfully restrained of his liberty, either in a common prison or elsewhere. His contracts made while under the restraint, are void, notwithstanding the consideration would otherwise be sufficient. But if the imprisonment be lawful they are valid, unless undue force or privation be employed to extort them, and in such case, the force or danger must be such as may well overcome a firm man. If, however, one be arrested upon process issued maliciously, and without probable cause, although it be regular and legal

¹ 2 R. S. 268, §§ 238 to 242. 3 id.

² Code, § 407. See 28 Barb. 285.

(Banks' 5th ed.) 455, §§ 164 to 168.

³ 5 Wend. 137. See 28 Barb. 285.

in form, a deed obtained from him may be avoided.¹ After the duress is removed, the party may ratify his contract.²

§ 73. Duress *by threat* is divided into four classes: 1st, for fear of loss of life; 2d, loss of member; 3d, of mayhem; and 4th, of unlawful imprisonment. A contract obtained under the influence of fear, excited by such a threat, is void, whatever may be the consideration.³ So terrifying a woman by threats of arresting her husband, is such a duress as will avoid a transfer of her property thus obtained.⁴ But the rule has never been extended to threats of injury to another, or to one's property, nor to a mere battery, the law holding that such a threat need not overcome a prudent man, inasmuch as an adequate remedy can be obtained for such an injury.⁵ But there may be an actual duress of property as well as of the person, and that is where a person, who has the property of another or to which he is entitled, in his possession, exacts, and the owner pays a sum which ought not to be paid as a condition for the delivery up of the property. In such cases the payment is void, and may be recovered back from the wrong doer.⁶

§ 74. The right of avoiding a contract for duress is, like infancy, a personal privilege, and can only be asserted by the person who was influenced by the duress to enter into it, and by a surety who united with him in its execution.⁷ No one can avoid his contract for duress occasioned by the imprisonment or threat of injury to another person, unless it be his wife.⁸

§ 75. It was formerly held that the defense of duress could only be maintained where the contract was made with the person who caused the duress, and that where one was by duress compelled to make a deed or bond to a stranger to the violence or threat, the instrument would be valid. The more modern doctrine however, is, that the deed or instrument might be avoided, whether the person receiving it were, or were not, a party to the duress.⁹

§ 76. Every description of contract is vitiated by the fraud or deceit accompanied by damage of one of the parties, and contracts so vitiated may be avoided by the party imposed upon.¹⁰ The basis of all

¹ Bac. Ab. tit. Duress, 6 Mass. 506. 36 N. Y. 365. 26 Barb. 122. Story on Con. §§ 397, &c. 16 Ill. 93. 20 Ind. 97. 2 Wis. 261. 16 id. 80. 2 Nevada 139.

² 7 Ohio N. S. 299. Par. on Con. 322. 15 Iowa, 380.

³ 5 Hill, 154. 1 Daly 71. 1 Redf. N. Y. 477.

⁴ 26 N. Y. 9.

⁵ Ch. on Con. 192. Story on do. § 399.

⁶ 2 Kern. 99. Parsons on Con. 321, 322.

⁷ 2 N. Y. Ch. Sent. 20. 36 N. Y. 365; but see 16 Ill. 358, as to a surety.

⁸ Story on Con. § 401. And see note (8) on that page, as to the duress of a father or child. Also Chitty on Con. 192.

⁹ Story on Con. § 400. Shep. Touch. 61. Jac. L. Dict. "Duress."

¹⁰ Story on Con. § 495. 6 John. 110. 32 N. Y. 275. 16 Wis. 485.

dealings is good faith, and each party contracting has a right to insist that the other shall neither state to him any falsehood in relation to the subject matter of it, nor conceal any secret defect, with a view to obtain an advantage.¹ Accordingly, if there is such a misrepresentation or concealment in regard to a sale, as amounts to a fraud, the vendor or vendee may refuse to deliver or accept the article sold or purchased;² or, if he discovers the fraud after delivery, the vendee may return the article, regard the sale void, and recover the price paid, in an action against the vendor.³ If the party deceived was led by the deceit to agree to run his own risk as to the quality of the article, or other subject of the contract, the fraud or deceit practiced will avoid it.⁴ Instead of returning the property, if the vendee is sued for its price, he may set up the injury in defense, and if the damage equals the price, defeat the action; if it is less, the amount goes in reduction of the plaintiff's claim.⁵

[§ 76a.] Fraud is never presumed, but must be proved,⁶ and that either by direct or circumstantial proof, as in other cases, so that it be clearly proved.⁷ As bearing on the question, it is proper to prove that the party charged with the fraud was engaged in other similar ones, at or about the same time, and either before or afterwards, but so connected in time and similar in their methods that the same motive may reasonably be imputed to them all.⁸ Under this rule, in a case of alleged fraudulent concealment of a vendee's pecuniary circumstances, it was held to be proper to show cotemporaneous fraudulent affirmations of his solvency.⁹ The question whether the evidence tends to establish fraud or not is one of law for the court to decide;¹⁰ whether or not that evidence, when given, proves the fraud or not, is one for the jury.¹¹

§ 77. If the fraud or deceit were committed by the agent of the contracting party, the latter will be bound by it in the same manner as if he committed it himself.¹² And this rule applies as well to the agents of corporations as to those of individuals.¹³

¹ 40 Barb. 512. 13 Min. 109.

² 30 N. Y. 655.

³ 23 Wend. 350. Also 2 Hill. 288.

⁴ 3 Camp. 154. 6 John. 110. 7 Wend. 380, 387.

⁵ 22 Ind. 51.

⁶ 18 John. 403. See 22 Barb. 550, 561.

⁷ 6 Ind. 176. 5 Wis. 79. 12 Iowa, 218. 22

id. 306. 24 id. 179. 27 Ill. 426. 42 Mo. 551.

⁷ 2 Cow. & Hill's Notes, 301. 8 Barb. 588. 2 Cal. 326. 8 id. 87. Id. 207.

⁸ 1 Hill, 311. 18 N. Y. 588. 28 id. 486.

⁹ 18 N. Y. 588.

¹⁰ 26 Barb. 127.

¹¹ 31 N. Y. 457. 26 Barb. 127, 2 Cal. 107. 35 id. 302.

¹² Story on Con. 496. 21 N. Y. 238.

¹³ 34 N. Y. 30.

§ 78. The concealment of any fact which the contractor is bound to communicate, is of itself a fraud.¹ So is any misrepresentation by which a party is misled, and this may be by acts or signs, or even by silence, as well as words.² And where a material misrepresentation is made, although inadvertently, or through mistake or ignorance, it is considered a constructive fraud, because its effect was to deceive; as where one, by himself or his agent, makes such misrepresentation, not knowing at the time whether they are true or false, and even when he supposed they were true.³ The misrepresentation or concealment must be in regard not to the law, but to a material fact operating as an inducement to the contract.⁴ If credit is given to a person on the representation of another that he is solvent, when he is not so to the knowledge of the one making the representation, this is a fraud, for which he is liable for the value of the goods sold.⁵ In regard to the vendee himself, the rule is that, if he is insolvent, but represents himself to be otherwise, he is guilty of a fraud;⁶ if he is insolvent, and conceals that fact with the preconceived intent not to pay for the goods, that is also a fraud;⁷ if he is insolvent, and does not disclose his situation, but is yet in business, and intends to continue it, and pay for his purchase, he is not guilty of fraud, for the reason that a mere omission to disclose insolvency, where no inquiries are made, and the vendee uses no artifice to mislead the vendor, is not a fraud.⁸ But, if the purchaser has committed some open and notorious act of insolvency, like making an assignment and breaking up his business, then his concealment of these facts will be a fraud.⁹

§ 79. Within the principle of the rule laid down in the last section, a vendor in negotiating a sale of property, must not intentionally conceal any secret defect in it known to him¹⁰ nor employ any artifice to disguise it. He is not, however, bound to enumerate all the defects of the article to be sold. The vendee must rely upon his

¹ Story on Con. §§ 516, &c. 22 Barb. 652. 8 Cal. 87.

² 1 Starkie, 352. 30 N. Y. 655. 31 id. 518, 529. 6 Ind. 188. 8 Cal. 87. 11 Iowa, 233.

³ 21 N. Y. 238. 36 Barb. 378. 40 id. 256. 27 Ind. 4. 14 Mich. 109. 42 Mo. 18.

⁴ Story on Con. §§ 507, 516. 9 Ind. 468. 27 Cal. 655. 32 Ill. 238.

⁵ 28 Barb. 466.

⁶ 1 Hill, 311. 20 Barb. 547. 33 Cal. 620. 39 Ill. 195.

⁷ 1 Hill, 302. 24 N. Y. 139. 41 Ill. 192.

⁸ 18 N. Y. 295. 23 id. 264. 20 Barb. 253. 21 id. 585. 33 Cal. 620. 39 Ill. 195. 32 Wis. 384.

⁹ 20 Barb. 253. Also 18 N. Y. 295.

¹⁰ Peake, 115. 2 Kent, 482, &c. 1 Pars. on Con. 461. 42 Barb. 38. 53 id. 425. 13 Minn. 109.

own judgment, or make enquiries, or exact a warranty, or purchase at his own risk; if he is negligent in making the purchase, it should not therefore be avoided. The law simply protects him against unfairness and fraud, and will only relieve him from the contract when he was deceived and actually misled.¹ If he at the time knew the statements or representations made to him to be false, he could not have been misled by them, and the contract would be valid, notwithstanding their falsity.² The mere recommending of the vendor's property, or exalting its fair value, is not a fraud, although there was exaggeration.³

§ 80. Where one purchased goods on credit obtained by fraudulent representations, the vendor (if the representations were made to him, or were made to be communicated to and influence him, and not otherwise),⁴ may reclaim his goods from the vendee or any one to whom he has transferred them, except a purchaser in good faith and for value,⁵ or he may recover their value in an action brought immediately and without regard to the credit agreed to be given.⁶ If, however, he have received the fraudulent purchaser's note, he must return or offer to return it or assign any judgment he has obtained thereon⁷ (which may be delayed till the trial, if a reasonable excuse is given for not making an earlier surrender⁸), the general rule being that whoever would rescind an agreement on the ground of fraud, must restore the other party to the situation he was in before the contract was made, unless the one committing the fraud has made this impossible, in which case the restoration must be as near as may be.⁹ Where an infant, by falsely representing that he was of age, obtained goods upon credit and then avoided paying for them on the plea of infancy, an action for the goods was maintained on the ground of the fraud.¹⁰

§ 81. The most common contracts in relation to chattels are, 1, those relating to sale or exchange; 2, those relating to bailment; and 3, those from which a debt arises. They will be considered in this order.

§ 82. (1.) Sale, or exchange, is a transmutation of property from

¹ 2 Kent, 482, &c. 1 Pars. on Con. 461. Story on Con. §§ 517, 842. See 28 Ind. 125.

² Story on Con. § 508.

³ 36 Ill. 109.

⁴ 37 Barb. 544.

⁵ 13 Wend. 570. 20 id. 167. Id. 267. 3 Barb. Ch. 451. 32 N. Y. 275. 14 Barb. 594.

⁶ 6 John. 110. 3 id. 235.

⁷ 7 John. 324. 2 Denio, 136. 23 N. Y. 264. 14 Barb. 594.

⁸ 23 N. Y. 264. 28 id. 486. 38 Barb. 375. *Infra*, § 233.

⁹ 1 Denio, 69. 16 Wis. 499. 24 Ind.

332. 25 id. 128.

¹⁰ 15 Mass. 359.

one to another in consideration of some price or recompense. If it be the giving of goods for goods, it is an *exchange*; if of goods for money or a promise to pay money, a *sale*. In both instances, the seller is called the *vendor*, and the buyer the *vendee*.¹ While the title remains in the vendor, or until the sale is perfected, the vendor may dispose of the goods at any time, and in any manner. A memorandum stating that the plaintiff had sold to the defendants a quantity of pig iron of a certain quality, then on ship at sea, is not a sale, but an executory agreement to sell, which was at end when the iron arrived and proved to be of an inferior quality.²

§ 83. If one agrees for goods at a certain price, he acquires no title to them until he has performed his part of the agreement. If the price is agreed upon and no terms of payment specified, the vendee must pay it in cash, to entitle himself to take them. If the terms of payment are specified, as to give an endorsed note, he must comply with them by giving such note.³ If a note is tendered and the seller makes no objection to it, it is deemed sufficient; if he objects, the vendee must show that it was sufficient.⁴ But if the vendor offers to sell his beast at fifty dollars, and the vendee says he will give it, the bargain is struck, and neither party can avoid it if the other makes immediate tender of performance on his part. But if neither the money be paid or the goods delivered, or tender be made by either party, no contract has been made, and the vendor may dispose of the goods as he pleases.

§ 84. Where goods are sold upon credit, and nothing is agreed upon as to the time of delivery, the vendee is immediately entitled to the possession, and the right of possession and title of the property and risk of accident vest at once in him.⁵ But where, by the contract of sale, any act remains to be done by the vendor, as if he is to weigh or measure or count them, until this be done the title does not pass.⁶ Where part is delivered and the residue is not, the title of only such portion as is delivered passes;⁷ and where one contracts for a chattel he is to manufacture, and receives his pay in advance, the title does not pass to the buyer until delivery.⁸

¹ See *infra*, §§ 221, &c.

² 4 Coms. 122. 16 N. Y. 595.

³ 2 Cowen, 110. 2 Hall, 345. 4 Barb. 9 Min. 142. 21 Iowa, 508. But see 34 Ill. 564. 25 id. 474. 17 Wis. 477. 15 Iowa, 193.

277. 36 Mo. 479.

⁴ 20 Wend. 435.

⁵ 5 Taunt. 617. 7 Wend. 404. 3 Seld.

357. 4 id. 291. 19 Barb. 417. 34 id. 454.

⁷ 6 East. 614. 6 Cowen, 250.

⁸ 15 Petersd. 193, note. 1 Kern. 35. And

⁹ Story on Con., § 803. 2 Kent 492. 5 see 26 Barb. 472.

Denio, 379. 4 Ind. 189. 9 Min. 142.

But, it is not necessary to separate a specified quantity sold from the whole mass, in order to pass the title, when the intention that it shall pass without it is clearly manifested;¹ if the agreement is otherwise complete, and the property identified, a stipulation of the seller to yet deliver the property at a particular place will not prevent the title from passing.² So the sale is complete if the property is delivered, though it is yet to be weighed.³

§ 85. As soon as the bargain is struck, the title of the goods is transferred to the vendee, and the right to receive the price to the vendor. But the vendor has a lien upon them for the price until it is paid (unless the sale is upon credit), and can retain the goods until the vendee pays the price.⁴ If a part has been delivered, the lien remains on the remaining portion; and so if the price has been paid, in part, the lien remains on every part of the goods undelivered, being only reduced in amount.⁵ If the vendee tenders the price to the vendor, and it is refused, then the lien is gone, and the goods may be taken, or an action brought for their value.⁶

§ 86. When the title to property has passed, by a sale to the vendee, but the property, or any of it, is undelivered, if it is afterwards destroyed or injured, while in the vendor's custody, without his fault, he is still entitled to and may recover the price of the same of the vendee, who must bear all loss.⁷

§ 87. Where the sale is completed and the vendor retains the custody of the goods, he is considered a *bailee* or trustee holding it for the use of the vendee, and is responsible for injury to it by ordinary neglect, for the reason that both parties are benefited by the bailment and the contract out of which it arose.

§ 88. By the statute of New York, contracts for the sale of any goods, chattels or things in action, for the price of fifty dollars or more, are void unless:

1. A note or memorandum of such contract be made in writing and be subscribed by the parties to be charged thereby; or
2. Unless the buyer shall accept and receive part of such goods, or the evidences or some of them, of such things in action; or
3. Unless the buyer shall, at the time, pay some part of the purchase money.⁸

¹ 19 N. Y. 330. 42 Barb. 573. 6 Wis. 490.

⁵ Story on Con. §§ 795, &c.

² 25 N. Y. 520. 27 Ill. 438. See 17

⁶ 2 Bl. Com. 448.

Iowa, 582.

⁷ 2 Bl. Com. 448, 449. 2 John. 13.

⁸ 41 Ill. 400.

⁸ 2 R. S. 135, § 3. 3 id. (Banks' 5th ed.)

⁴ 2 Bl. Com. 448. 30 N. Y. 549. 9 Min. 221.

§ 89. Contracts to deliver at a future day a thing not then existing, but which is to be made, are held not within the rule laid down in the preceding section, but are contracts for work and labor.¹ But where the thing sold exists *in solido*, and is yet to have something done to it, either to finish it, or make it ready for delivery, in these and similar cases, it is sometimes a question of doubt whether the agreement is or not within the statute. Thus, where one agreed to sell his wheat, to be delivered after he had threshed a part of it which was not ready, it was held the contract was void because not in writing.² But a subsequent case³ holds that a contract to deliver two thousand barrels of flour to be ground out of wheat that had been bargained for, but not received by the seller, was not within this statute. And so, in another case,⁴ where a mechanic agreed to furnish the materials and do the carpenter work and turning for several buildings, this was called a contract, not for a sale, but for work and labor. The same rule was applied where a marble cutter agreed to sell a monument already worked into the general form desired, all that was yet to be done being to polish it properly and engrave the necessary inscriptions upon it.⁵ These different cases do not entirely agree in principle with each other. Perhaps the rule that will finally be established is that suggested in 19 *Barbour*, just referred to, and that is: "Whether the work and labor required to prepare the subject matter of the contract for delivery is to be done for the vendor himself or the vendee? In the former case, the contract is really a contract of sale, while in the latter it is a contract of hiring." A contract for the sale and delivery of standing trees is not a contract for work and labor, so as to take the transaction out of this statute.⁶

[§ 89a.] If the goods sold are worth over fifty dollars, they are within the statute, although the price is not definitely agreed upon;⁷ but it must appear plainly that the value was above the statute limit.⁸ A sale of a judgment for a sum exceeding fifty dollars is prohibited by this section;⁹ but not an agreement to turn out a note in payment of a debt,¹⁰ or to pay for goods already bought.¹¹ Growing hops are personal property, within the statute.¹² Hop roots, when rooted in the ground, are real estate; yet, a parol agreement to deliver a

¹ 18 John. 58. 26 Barb. 138. 28 id. 38.

² 23 Wend. 270.

³ 10 Barb. 406. Same principle, 2 Sand.

239.

⁴ 19 Barb. 455.

⁵ 33 Barb. 202.

⁶ 4 Keyes, 180.

⁷ 41 Barb. 610, 612.

⁸ 18 John. 58.

⁹ 1 Barb. 379, 387.

¹⁰ 18 Barb. 320.

¹¹ 32 Barb. 630.

¹² 36 Barb. 415.

quantity of them at a future time is valid, it being really an agreement for the sale of merchandise.¹ The rule is different as to contracts for the sale and delivery of standing trees, which are not goods or chattels, but are real estate.²

§ 90. The note or memorandum of the contract must state its terms with reasonable certainty, so that it may be understood from the writing itself, or be capable of being made so by reference to something else.³ The contract cannot rest partly in writing and partly by parol.⁴ It will be good if made by an agent of either party, or by a person, as a broker, authorized by both parties; and when so subscribed by the broker or other agent, it may be in his own name, though the name or existence of a principal does not appear in the instrument.⁵ It is not sufficient that the names of the parties are in the body of the memorandum. They must be signed at the end of it.⁶ Other sections of the statute of frauds require that the memorandum be signed "by the party;" the one under consideration, "by the parties to be charged therewith." Under this, it has been uncertain whether a subscription by the vendor was sufficient. In one case, in the court of errors of New York, it was assumed that it was,⁷ and previous cases had been to the same effect; one of them holding it enough for the one who had to "perform the principal part of the contract," such as to deliver the goods, to sign it;⁸ this rule has been criticised by our higher courts,⁹ and it is finally laid down, by good authority, that the memorandum must be signed by both parties, where there are obligations yet to be discharged by them both, as to deliver, pay, &c.¹⁰ And, as it is difficult to conceive a case, where this statute applies, in which the agreement is not executory by both parties, it may be laid down as the rule, till otherwise held by the appellate courts, that *all* memoranda, under this section, must be signed by *all* the parties thereto, or their agents. In Minnesota, under a similar statute, it is held sufficient if it is signed by the party only against whom it is sought to be enforced.¹¹

¹ 52 Barb. 482.

² 4 Keyes, 180. 50 Barb. 302.

³ 3 John. 399. 13 id. 297. 4 Kern. 584. 39 Barb. 620.

⁴ 3 John. 399. 25 N. Y. 153. 3 Bosw. 372.

⁵ 26 Wend. 341. 4 Kern. 584. 24 N. Y. 57. 2 R. S. 136, § 8. 3 id. (Banks' 5th ed.) 222.

⁶ 26 Wend. 341. 2 Seld. 9. See 23 Ind. 363.

⁷ 26 Wend. 341, 349.

⁸ 2 Caines, 117. Also 3 Wend. 112.

⁹ 24 N. Y. 57, 59.

¹⁰ 2 Robertson, 333. S. C. 30 How. Pr. R. 425. Also 4 Robertson, 219.

¹¹ 13 Minn. 191. See, also, 36 Mo. 534. 25 Iowa, 289.

§ 91. An auctioneer, after knocking down the goods, is an agent for both seller and buyer, the statute providing that an entry in his sale book of the nature and price of the property sold, the terms of the sale, the name of the purchaser and the name of the person upon whose account the sale is made, shall be deemed the note of the contract required.¹ But the entry must be made at the time and place of sale. It is not enough that a minute be made, at the time, of the sums bid and the name of the bidder, although the residue of the entry be made shortly after, at another place.²

§ 92. The acceptance or receipt of part of the goods by the purchaser, or the *delivery* to him, must be by virtue of the contract, and with the vendor's consent, and may be either actual or constructive, and inferred from circumstances;³ as where the vendor, after receiving the vendee's note for the purchase money, points out the goods as the vendor's property;⁴ or where he gives the purchaser an order on a third person with whom the goods are, for their delivery;⁵ or delivers to him the key of the house where they are, or the receipt of the person with whom they are stored;⁶ or where he delivers them to a carrier to transport to the purchaser;⁷ or they are made for a person and marked with his name, and afterwards pointed out to him by the maker, who tells him they are his and marked for him, and the vendee accepts them;⁸ where a debtor makes a schedule of some marble owned by him, but in the possession of others and delivers it to his creditor, and the two then go to the places where it is stored, at one of which the creditor writes his name on the marble with a pencil and changes it place, and at another straightens up some of it that has fallen down, and makes arrangements for its continued storage, agreeing with the debtor to sell it and apply it on the debt, it is held there was a sufficient delivery so far as the statute was concerned.⁹ But there must be something more than words; there must be some act of the parties amounting to a transfer and acceptance of the possession, with the intent to deliver and accept the same.¹⁰

§ 93. The delivery and acceptance required by the statute need not be at the time of the sale. If they occur afterwards, the contract is

¹ 2 R. S. 135, § 4. 3 id. (Banks' 5th ed.) 222.

⁵ 5 John. 335. 6 Seld. 285.

² 12 Wend. 548. 1 Duer. 132; but see 3 id. 395, 408. 4 Kern. 584, 593.

⁷ 14 Wend. 546. 2 Hill, 137. 3 id. 141.

22 N. Y. 368. 2 Abbott, 282. 4 Wis. 154. ⁸ 32 Barb. 630.

³ 1 Denio, 48, 52. See 39 N. Y. 275. 15 Iowa, 458.

⁶ 42 Barb. 70.

⁴ 2 Caines, 38. See 15 Wis. 144.

¹⁰ 1 Comstock, 261. 3 Keyes, 409. And see 40 Barb. 98. 31 How. Pr. R. 4.

⁵ 3 Caines, 182. 37 Ill. 370.

rendered valid.¹ A delivery only, however, is not sufficient. There must be an acceptance by the purchaser, or his authorized agent.² But the statute only requires the acceptance and receipt of a part of the goods, and, accordingly where the contract is divisible, the acceptance of fourteen hundred bushels of barley malt out of a purchase of five thousand bushels, was held sufficient, and an action was sustained for the non-delivery of the balance.³

§ 94. A delivery in certain cases may be symbolical, as the delivery of a quantity of grain in a warehouse by the giving the vendee the key,⁴ or an order on a warehouseman, with whom the goods sold are deposited;⁵ provided the order gives the vendor the legal control of the property.⁶ Where one bought a piece of land with a quantity of ponderous articles upon it, the taking possession of the land was held sufficient to warrant the conclusion that the articles were delivered.⁷ So the pointing out a quantity of logs afloat in a boom.⁸ The selection of goods in a merchant's store by a customer who marked them and laid them aside without paying for them while he went for a porter to carry them away, was held no delivery, and the title of the goods remained unchanged.⁹ But this rule has not been strictly adhered to, and such circumstances as marking goods, or similar ones, are since held to be evidence of acceptance sufficient to go to the jury.¹⁰

§ 95. In all of these cases, either an *actual*, or a *symbolical*, or a *constructive* delivery must be made; the law only requires such a delivery as is consistent with the nature and situation of the thing sold.¹¹ It is for this reason that, as we have seen, ponderous and bulky or cumbrous articles may have this constructive delivery, or those which, at the time, are not present; in which last case giving an order for them may be a sufficient delivery, or, as in a late case, giving a schedule of them to the purchaser, who arranges with those having the property in charge to keep it for him.¹²

§ 96. An actual delivery is in some cases inferred by the courts. When the purchaser deals with the property as if it were in his own possession, and sells a part of it, the jury may infer a delivery of the

¹ 1 Seld. 537. 32 Barb. 434. 31 How. Pr. R. 4.

² 6 Wend. 397. Anth. N. P. 164. 3 Keyes, 409.

³ 1 Seld. 537. 3 Robertson, 173.

⁴ 5 John. 335.

⁵ 3 Caines, 182. 37 Ill. 370.

⁶ 3 Bosw. 171.

⁷ 13 John. 294.

⁸ 12 Mass. 300.

⁹ 1 Dal. 171. Also 2 Barn. & C. 37.

¹⁰ 19 Barb. 416 and refs. 2 Kent, 500, &c. gives other cases of symbolical delivery.

¹¹ 3 Sand. 230. 44 Ill. 141.

¹² 42 Barb. 70.

whole;¹ as where the purchaser of a yoke of oxen, without any writing, or payment, or acceptance at the time, afterwards came and took them away, it was held that there was a delivery, and he was chargeable for the price.² In another case, where one bought a pair of horses, and requested the vendor to keep them for him in his stable, it was held that the vendor's taking charge of the horses to keep at the purchaser's request implied a previous delivery to him.³ That case has since been questioned as carrying the doctrine of constructive delivery to the utmost verge of safety; and later cases seem to have resumed a stricter doctrine, and qualified the influence to be drawn from the acts of the buyer.⁴

§ 97. There is a class of cases where, although the goods have actually passed into the hands of the purchaser, the law infers no compliance with the statute; as where he obtains possession of a bill of lading without the sellers' consent;⁵ or where goods are purchased for cash on delivery, and, by a usage of trade, the cash is to be paid within a certain number of days; in such cases the delivery is a qualified one only.⁶ So, where a manufacturer made and placed a boiler and other machinery in a boat, under a contract by which he was to be paid a certain price, a portion of which was to be secured by a personal mortgage, and the vendee clandestinely went off with the boat to Canada, refusing to pay for the machinery or execute the mortgage, it was held that there had been no unconditional or absolute delivery to the vendee, so that he had acquired title.⁷ But, in such cases, the title does pass, and the delivery is perfect, if tender of payment, according to the agreement, is made by the purchaser, although it is not accepted by the seller.⁸ Other cases, where the delivery is not perfect, as given in the books, are where goods are purchased at auction for cash, and the purchaser receives the property without paying for it; or where I purchase a boat load of lumber or wheat, to be paid for on delivery, and it is placed in my warehouse, and I then refuse to pay for it. In these cases, as in other similar ones, the delivery is said to be conditional, and the title of the property is not changed.⁹

§ 98. The statute applies as well to contracts to be performed at a future day, as those where the sale is intended to take effect at

¹ 1 East. 192. 7 Cowen, 256.

² 11 John. 283. Supra, § 93, note (1).

³ 1 Taunt. 458.

⁴ 2 Kent, 508.

⁵ 30 How. Pr. R. 313.

⁶ 25 Barb. 474. 28 id. 393.

⁷ 19 Barb. 266.

⁸ 16 Barb. 277.

⁹ Infra, §§ 227, &c.

once; as to deliver apples or other articles, if the value exceeds fifty dollars.¹ The payment of a portion of the purchase money on a sale, it will be seen, is a compliance with the statute, and it seems that even a shilling is sufficient. Such payment is sometimes called earnest money. The delivery and acceptance of the goods, or some part of them, as we have seen, may be at a subsequent time, but in regard to the purchase money, that is required by the statute to be paid at the time of the making of the agreement, and the decisions are to that effect.² But if a payment is made and accepted at a subsequent day, the sale is valid, it being considered in such a case as not having been made until such payment and acceptance, and it dates from that time, the same as if a new and valid bargain was then made.³ The payment may be made by applying the amount on a prior indebtedness of the seller to the purchaser;⁴ but in order to make it effectual, the application must be then and actually made, so as to bind the parties by their acts; a mere agreement does not answer.⁵ Entering the transaction upon the blank leaf of a book (not a ledger or day book) is not enough;⁶ nor one in a memorandum, which is not an account book.⁷ The giving of the purchaser's promissory note is not sufficient payment to take the case out of the statute.⁸

§ 99. II. A bailment is a delivery of a thing to another in trust, for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust.⁹ The one who delivers the thing is called the *bailor*; the one who receives it the *bailee*.

[§ 99a.] It is sometimes doubtful whether a given case is one of sale or bailment. If, in a lease of lands, with cows or other stock accompanying it, it is provided that an equal number shall be returned, or stock of equal value, or there are similar provisions, the stock becomes the property of the tenant; but if the same property is to be returned, it is a bailment;¹⁰ selling ale in barrels, the barrels to be returned, or, if not, to be accounted for, is a bailment of the barrels;¹¹ wheat taken to be ground, the miller to return a specified quantity of flour, but not to keep the wheat separate, is a case of

¹ 10 John. 364. 18 id. 58. 5 Wend. . ⁷ 44 Barb. 96.

139.

⁸ 18 Abbott, 392. S. C. 28 How. Pr. R.

² 32 N. Y. 519. 33 Barb. 543. 40 id. 98. 463.

³ 39 N. Y. 275. 52 Barb. 483.

⁹ Story on Bail. § 2.

⁴ 5 Hill, 200.

¹⁰ 13 John. 358. 7 Cow. 752. 10 Ind.

⁵ 32 N. Y. 519. 3 Keyes, 492. 2 Trans- 325.
script, 263.

¹¹ 18 N. Y. 363.

⁶ 32 N. Y. 519.

sale;¹ but when wheat is delivered, the miller manufacturing it into flour, delivering so much flour for so much wheat, the owner of the wheat paying for the barrels, and also paying the miller so much per barrel, it is a bailment only;² and so is an agreement by which one person furnishes hides and another is to tan them, the expenses and profits to be divided between the parties in a certain manner agreed upon between them;³ a contract to deliver twenty sheep in four years in exchange for ten delivered now is a sale and not a bailment.⁴

§ 100. There are five classes of bailments:

1. *Deposit*, where the goods are delivered to the bailee to be returned to the bailor on demand and without recompense; as where on a journey the snow leaves me, and my friend gratuitously receives my sleigh to keep until I call for it. In such a case no action against the bailee will lie until after a demand of the property bailed, and he refuses to deliver it.⁵

2. *Mandate*, where the goods are received by the bailee to carry to some place, or to perform some act to them without reward; as where my neighbor gratuitously takes my trunk to carry from my house to town for me, or takes my horse to train him to the saddle or harness.

3. *A loan for use*, is where an article is delivered to the bailee to be used by him without paying for the use; as the loan of a horse to ride, or a gun to go shooting with.

4. *A pledge or pawn*, is where goods are delivered by a debtor to his creditor, to be retained until his debt be discharged. It differs from a mortgage. In a mortgage the title of the property mortgaged passes from the mortgagor to the mortgagee, subject to be defeated if the condition is performed. In a pledge the title remains in the bailor, and the bailee has only a special property. An actual delivery is necessary to render a pledge valid.⁶

5. *Letting to hire*, is a bailment where compensation is to be given for the use of the thing bailed, or for labor or services about it. This species of bailment is of three kinds: 1. The hiring a thing for use, by which the bailee for a compensation acquires its temporary use, as where I hire my neighbor's oxen to use for a day; 2. The delivery of a thing to the bailee to have some service performed by him upon or in relation to it; as where I leave cloth with

¹ 21 Wend. 83. 2 Coms. 153. 12 Ind. 252. 10 Iowa, 565.

² 4 Comstock, 76, S. P. 3 Seld. 433.

³ 21 Barb. 92.

⁴ 44 Barb. 162.

⁵ 9 John. 361. 22 Barb. 314.

⁶ Story on Bail. § 287. *Infra*, §§ 616, 617.

a tailor to be made into a garment for me, or my wheat with a warehouseman to be sold for me, or my trunk or my horse with a tavern-keeper, in whose house I am a guest; 3. The delivery of goods to be transported by the bailee for a reward.

§ 101. In determining the responsibility of bailees for the violation of the contract of bailment, a distinction is made between, 1, *slight neglect*; 2, *ordinary neglect*; and 3, *gross neglect*. Slight neglect is the want of such diligence as very circumspect and cautious persons use in the care of their own goods and chattels, and which is called *extraordinary care*. Ordinary neglect is the want of ordinary diligence, or the omission of the care which every man of common prudence takes of his own concerns called *ordinary care*. Gross neglect is the want of even slight diligence or of such care as every man of common sense, however inattentive, takes of his own property, and is esteemed in law a *violation of good faith*.

§ 102. A bailee who derives no benefit from the bailment, as in case of a deposit or mandate, is responsible only for gross neglect.¹ One who alone receives benefit from the bailment, as in loans for use by the bailee without compensation, is responsible for slight neglect.² Where the bailment is beneficial to both parties, as in case of pledging³ or letting to hire, or where creditors receive from their debtor the note of a third person, for collection,⁴ the bailee is answerable for ordinary neglect, unless where there is a special agreement in relation to it, which is permitted with some exceptions. All bailees are answerable for actual frauds, even though the contrary be stipulated. It is well settled that they may contract from exemption even from gross negligence.⁵ The finder of property is a depositary, and liable accordingly.⁶ That a bailee of the use of a horse for which he makes no compensation, is at expense for his keep, does not make it any the less a gratuitous bailment.⁷

§ 103. Bailees are not answerable for a loss occasioned by inevitable accident or irresistible force, except where it is provided for by special agreement. *Inevitable accidents* are such as are produced by physical causes which are irresistible; as a loss by lightning or storm, the perils of the sea, inundations, earthquakes, or by sudden death or illness.⁸ *Irresistible force* is such an interposition of human agency as from its nature and power is uncontrollable; as losses

¹ 5 Ind. 131. 8 id. 315.

² 37 Ill. 250.

³ 6 Cal. 643.

⁴ 6 Seld. 261. 36 Barb. 81.

⁵ 2 Comstock, 204. 4 Seld. 375.

⁶ 1 Clarke, 135.

⁷ 37 Ill. 250.

⁸ 7 Cowen, 499.

occasioned by the inroads of a hostile army. Robbery by force is irresistible; but a loss by private stealth is presumptive evidence of ordinary neglect.¹

§ 104. Upon the several principles given in the last three sections, the following rules have been deduced:

1. A depositary is responsible only for gross neglect, or in other words for a violation of good faith.

2. A depositary, whose character is known to his depositor, shall not answer for mere neglect if he take no better care of his own goods, and they also be spoiled or destroyed.²

3. A mandatory to carry is only responsible for gross neglect, or a breach of good faith.³

4. A mandatory to perform a work is bound to use a degree of diligence adequate to the performance of it.⁴

5. One cannot be compelled to perform a promise to receive a deposit or mandate, nor to pay damages for refusing to keep such a promise, because there is no consideration for the promise. But if the bailee has received the deposit or mandate, and neglects to perform the contract of bailment, he is liable.⁵

6. A borrower for use is responsible for slight neglect.⁶

7. A pledgee or *pawnee* is answerable for ordinary neglect.

8. The hirer of a thing is answerable for ordinary neglect. (Accordingly, if a horse is hired for a journey, and is lamed, or lost, as where it was forcibly taken by armed soldiers,⁷ or goods hired are burned, without the bailee's fault, the bailor must bear the loss. And if, in consequence of the accident, as for instance to a horse, the bailee is put to any expense in consequence thereof, and obliged to procure other means of conveyance, the amount may be recouped against the bailor's claim for the hire of the horse.⁸ On the other hand, if the horse is injured by the fault of the bailee, the bailor may charge him with the expense attending the doctoring and otherwise caring for him.⁹)

9. A workman for hire must answer for ordinary neglect of the goods bailed, and apply a degree of skill equal to his undertaking.¹⁰

¹ Story on Bail. §§ 26, 27. But see *id.*, § 39. guilty of such neglect as to render him responsible. 3 John. 170.

² Story on Bail. §§ 66, 67.

⁵ 5 Term R. 143. 2 John. Cas. 92. 4

³ 5 Ind. 462. 1 Clarke, 135, 141. 17 Ill. 170.

John. 84.

⁶ 4 Sand. 5. 7 Ind. 155. 37 Ill. 250.

⁷ 28 Ind. 125.

⁴ Where one took a slave on trial, with a view to purchase him, and sent him half a mile on an errand, when the slave ran away, it was held the bailee was not

⁸ 13 John. 211. 3 Barb. 380. 33 id. 241.

⁹ 13 Minn. 335.

¹⁰ 8 Ind. 315. 13 Wis. 104.

10. A letter to hire of his care and attention is responsible for ordinary neglect. A wharfinger is such, and a warehouseman.

11. A carrier for hire by land or water is answerable for ordinary neglect.¹

Other decisions have been made as follows:

A bailee, bound only to ordinary diligence, cannot, on the ground of mistake, evade responsibility for a loss occasioned by gross carelessness on the part of others, where he offers no evidence of any care or diligence on his own part;² nor is he bound to keep articles deposited with him after he has offered to return them and made an actual tender to the owner; if, on such tender, they are not taken away, the bailee may lawfully place them off his premises, and is not responsible for their subsequent loss.³

It is unsettled what is the liability of a sheriff or other officer for goods taken by him under legal process. Judge Story thinks he is bound to employ ordinary diligence only.⁴ But this is questioned by the court of appeals of New York,⁵ and it is doubtful if a more rigid rule will not yet be established against them.

Agistors of cattle are bound only to exercise ordinary care.⁶

§ 105. The following exceptions to the rule are recognized:

1. One who spontaneously and officiously engages to keep or carry another's goods, though without reward, must answer for slight neglect.

2. If one, through strong persuasion and with reluctance, undertakes the execution of a mandate, no more can be required of him than a fair exertion of his ability.

3. All bailees are responsible for losses happening after their refusal to return things bailed on a lawful demand, although the loss is by casualty or violence.

4. A borrower and a hirer are answerable in all events, if they keep the things borrowed or hired after the stipulated time, or use them differently from their agreement.

5. A depositary and a pawnee are answerable in all events, if they use the thing deposited or pawned, unless it be of such a nature as to be a charge upon the pawnee, as a horse or cow. In such case he

¹ 4 Ind. 368. 31 Ill. 353. 39 id. 325. 42 id. 132. See the next section for the responsibility of common carriers of goods, passengers and baggage. This subdivision has reference only to contracts with persons who do not exercise the

business of common carriers. See Story on Bail. § 457. 27 Cal. 11.

² 3 E. D. Smith, 264.

³ 2 E. D. Smith, 60.

⁴ Story on Bail. § 130.

⁵ 21 N. Y. 103.

⁶ 38 Ill. 96. 44 id. 225. 40 Mo. 520.

may use the horse moderately, or milk the cow regularly; but any profit derived from it must be applied to the discharge of the pawner's debt.¹

6. An innkeeper is chargeable as a bailee for the goods of his guest within his inn, whether delivered specially to him or his servants, or placed where directed by them, or put where it is usual to deposit them. Their rights and liabilities are more fully treated in a subsequent part of this work.²

7. A *common carrier*, by land or water, by which term is meant one who undertakes for hire to transport from place to place, the goods of such as choose to employ him, is responsible from the time he receives the property³ for loss or damage to the goods intrusted to him, unless occasioned by the act of God or the public enemies, and this irrespective of any question of negligence on his part;⁴ hence, if it is alleged, it need not be proved.⁵ By the "act of God," is meant natural accidents that could not happen in any way by the intervention of man; as snows, storms, lightning and tempest, and, to excuse the carrier, it must be the sole and immediate cause of the loss.⁶ Under this rule, a destruction by an accidental fire, not caused by lightning, is no excuse, even though the immediate cause of the burning was a sudden gust of wind so changing the course of a distant fire as to drive the flames upon the goods;⁷ nor is a loss excused where its immediate cause was the contact of a steamboat with the mast of a sloop before then sunk in a squall.⁸ But one is, where it is for goods thrown overboard in a storm, if it was necessary to save the vessel and the balance of the cargo from destruction.⁹

8. A carrier of passengers by land is not an absolute insurer, at all events, against all injuries, except by the act of God or the public enemies, as is a common carrier of goods; but he is bound to carry safely those whom he undertakes to transport. In regard to stage coaches and similar methods of conveyance, Judge Story lays down the rule, thus: "Passenger carriers bind themselves to carry safely those whom they take into their coaches, as far as human care and foresight will go, that is, for the utmost care and diligence of very cautious persons; and of course they are responsible for any,

¹ Story on Bail. § 89.

² *Infra*, § 595.

³ 3 Kern. 569.

⁴ 6 Seld. 431. 1 Kern. 485. 29 N. Y. 115.
44 Barb. 655. 23 Cal. 268. 39 Ill. 395. 25
Ind. 434. 21 Wis. 21. 39 Mo. 184. 40
Id. 401. 43 id. 421.

⁵ 31 Barb. 38.

⁶ 29 N. Y. 115. 44 Barb. 655. 35 Cal.
416. 40 Mo. 491.

⁷ 6 Seld. 431.

⁸ 29 N. Y. 115.

⁹ 44 Barb. 655.

even the slightest neglect."¹ And, although it is sometimes said that the same rules apply to carriers by stage and on railroads,² yet this is hardly true, for while in both cases it is said a certain degree of care must be exercised, it is plain that what would be sufficient in case of a stage-coach traveling at eight miles the hour, would not be so in case of a train of cars running at three times that speed; and accordingly the later decisions hold that the *degree* of vigilance must vary with each case and the probable consequences of negligence,³ and that railway carriers are bound to exercise all precautions and the utmost degree of care and skill in the preparation of the means of conveyance, and are liable for injuries occasioned by latent defects which could not be discovered by the most vigilant external examination if they could have been discovered in the process of manufacture, by the application of any test known to men skilled in such business.⁴ They are also liable for damages for an injury which could have been prevented by the use of any improvement in its apparatus, the adoption of which was within its power, so as to be reasonably practical.⁵ In case of accident, the passenger may endeavor to save himself; and, in such an emergency, the law does not require from him all of the presence of mind and care of a prudent and careful man. He is only required not to act rashly under the circumstances, or under undue apprehension of danger.⁶ But in regard to the baggage of their passengers, the same rule applies as to goods taken for transportation, and the carriers are liable for all injuries to it, except such as are occasioned by the act of God or the public enemy, and this, though no separate price is paid for its transportation.⁷ Accordingly, the carrier may be liable for an injury to baggage, when he would not be for one at the same accident, to the passenger himself;⁸ but the baggage must be such articles as are usually carried by travelers, and an amount of money which might be reasonably carried for traveling expenses, taking into account the journey itself, and including an allowance for sickness, accidents and sojourning by the way.⁹ Under this rule a

¹ Story on Bail. § 601. Also, 26 N. Y. 534. 5 Duer, 193. 16 Ill. 558. 19 id. 510. 102. 34 id. 404. 36 id. 378. 4 Iowa, 547. 30 id. 9. 22 Ind. 26.

⁴ Greene, 555. 16 Ill. 558. 19 id. 510. 23 id. 357. 13 Cal. 599. 26 Ind. 228. 11 Minn. 277. id. 296. 36 Mo. 351. 37 id. 537.

² Edw. on Bail. 587, 588.

³ 2 Kern. 425. 3 id. 9. 20 N. Y. 65. 16 Ill. 558.

⁴ 3 Kern. 9. Also, 18 N. Y. 408. Id.

⁵ 19 N. Y. 127.

⁶ 17 Ill. 406. Id. 509. 32 Barb. 393.

⁷ 26 Wend. 591. 13 id. 628. 30 N. Y. 594. 34 id. 548. 36 Barb. 557, 561. 45 id. 218.

⁸ Edw. on Bail. 427, 428. 13 Wend. 611, 629.

⁹ 30 N. Y. 594. 4 Duer, 116. 4 Bosw. 225.

passenger may take, as baggage, such articles as it is usual for persons to carry with them for necessity or convenience, or for ornament, as his working tools, jewelry, a few books for reading, a watch, guns for sporting purposes, or a revolver.¹ But jewelry for sale or purchased as presents for friends, or masonic regalia, or engravings, are not baggage within the rule.² The liability continues till it is delivered to the owner or the consignee or warehouseman,³ and a delivery, upon a forged order, will not excuse the carrier;⁴ but the carrier's strict accountability terminates within a reasonable time after the baggage has reached its destination, if he is then ready to deliver it to the passenger, his obligation being only to transport and deliver the same at a reasonable time and in the usual manner.⁵ Accordingly, if a passenger leave his trunk with the carrier over night, no understanding or arrangement being made in regard to it, and the same is destroyed by the accidental burning of the depot before morning, the carrier is not liable, if without fault, or not guilty of any negligence.⁶

§ 106. In all cases a bailee is responsible for a loss of any kind, if it be occasioned by the degree of negligence for which his contract makes him liable. Thus a carrier by water is not answerable for a delay occasioned by the freezing of the river or canal which he navigates; but if, by his negligence, the transportation has been so retarded that the vessel with her cargo is frozen in before reaching its destination, he is answerable for all the loss.⁷

[§ 106*a*.] A common carrier is bound, either with or without a special agreement, to transport and deliver the goods entrusted to him in a reasonable time, depending in each case upon the particular circumstances thereof.⁸ If not so transported or delivered, he is liable. If his means of carrying it are destroyed, as a vessel, for instance, he must use all means to secure another;⁹ and if two kinds of property are delivered to him, one perishable and the other not, and owned by different parties, if he cannot take all he may give preference to the former.¹⁰ It is no defense that a delay was occasioned by the negligence or willful act of the conductor of a railroad train, nor by the wrongful and sudden refusal of a large number of

¹ 4 E. D. Smith, 181. id. 453. 10 How. Pr. R. 330. 4 Duer, 116. 6 Ind. 242. 22 Ill. 212. Id. 278. 24 id. 332. 38 id. 219.

² 4 Bosw. 225. 2 id. 589.

³ 29 Barb. 35.

⁴ 26 Wend. 591. 16 Ill. 502.

⁵ 29 Barb. 35. 36 id. 557.

⁶ 34 N. Y. 548.

⁷ 23 Wend. 306. See also 30 N. Y. 564.

⁸ 22 Barb. 278. 6 Duer, 375. 18 Ill. 488. 40 Mo. 491.

⁹ 28 N. Y. 217.

¹⁰ 45 Barb. 502.

its servants to work.¹ But if a road is properly equipped and in good order, it is not liable for a delay occasioned by an unusual accumulation of freight at a particular point, if it is forwarded as fast as possible, and without preference in the order of its receipt.² A common carrier, and also a carrier of passengers, may contract absolutely to transport and deliver in a certain time; and if he do so, he is not excused, even by inevitable accidents, from the performance of his agreement.³ So he may, by express contract, limit his legal responsibility, the burden of proving which rests on the carrier.⁴ But he cannot so contract against his own fraud, willfulness, recklessness or gross neglect in the transportation of freight for which a compensation is paid.⁵

[§ 106b.] A bailee (and a common carrier comes within the rule) may show, in defense to an action for goods intrusted to him, that they have been taken from him by the authority of the law, exercised through regular and valid proceedings, it being incumbent on him to show that they were so;⁶ but if he received them of one person, he cannot resist his claim for them on the ground that they belong to others who have given notice of that fact, even, it seems, if the depositor had fraudulently obtained and converted them.⁷ If, however, they were delivered by an agent, the principal may claim them, even though the agent has ordered that they be not given up without his consent.⁸

§ 107. The foregoing rules may be diversified to infinity by the circumstances of each particular case. The duty of the judge and jury is first to determine the nature of the contract of bailment, and the degree of neglect which renders the bailee accountable, and then to apply the rules to the circumstances in evidence. The question then becomes one of fact.⁹

§ 108. III. DEBT. This last species of contract comprehends all agreements, express or implied, by which one party becomes bound to pay another a sum of money, either fixed by the terms of the contract or capable of being determined by other evidence. In all such cases an action can be brought to recover the amount justly

¹ 17 N. Y. 362. 20 id. 48.

² 2 Kern. 245, 251. 40 Mo. 491.

³ 2 Kern. 99. Id. 251.

⁴ 1 Kern. 485. 49 Barb. 21. Id. 283.

1 E. D. Smith, 115. 2 Ohio N. S. 131. N. Y. 403. *Infra*, § 735.

5 Mich. 368. 6 id. 243. 19 Ill. 136. 24

id. 466. 37 id. 484. 42 id. 474. 22 Ind.

26. 1 Oregon, 409.

⁵ 19 Ill. 136. 42 id. 474. *Ante*, § 37 *a*, note (1).

⁶ 35 Barb. 188. 37 id. 122. 45 id. 390.

⁷ 37 Barb. 129. But see 1 Duer, 79. 36

⁸ 44 Barb. 505.

⁹ 3 Kern. 9.

due to the plaintiff. Under the ancient system of pleading, the action usually brought was termed an action of trespass on the case upon an assumpsit, or an action of assumpsit. All that is necessary now to warrant a judgment, is that the pleadings set forth a cause of action arising from the default of the defendant in keeping his contract, in consequence of which the other party has suffered loss.

§ 109. In contracts, the evidence of which is in writing, such as records, judgments, decrees, and all written instruments, whether with or without seal, the obligations of the parties are determined by the *interpretation* of their language.¹ There are certain rules of interpretation which are observed by courts, among which are the following:

1. The intention of the parties, where it is manifest from the instrument, shall prevail unless it is contrary to some rule of law.²

2. Where the intention is manifest, a mistake or inconsistency in the language employed will be disregarded; as where the condition of a bond for the payment of money was that it should be void if it was *not* paid, the court rejected the *not*, as inconsistent with the intention. And in like cases, where the omission of a word is manifest, courts will supply it.³

3. Where, by the language of the contract, persons or property are described or referred to, by a description which may be applied to other persons or property, extrinsic evidence can be received to render it certain which was intended.⁴ As where I contract to sell my farm in Blackacre, and I have at the time two farms there. In this case it can be shown by other evidence than the contract which farm I intended. The defect in the contract is termed a *latent ambiguity*. If, however, there is an uncertainty arising from the language of the instrument itself, as where one by will gave to "A., B. and C., and the heirs one of them," extrinsic evidence cannot be given to show whose heirs he intended. In this case the ambiguity is *patent*.⁵

4. The words employed in a written instrument are to be understood in their ordinary sense. If they are technical terms, or words used in a peculiar sense, by persons in a particular trade or profession, extrinsic evidence may be given to show their meaning.⁶

¹ 2 Comstock, 153.

² Story on Con. § 634. 18 N. Y. 363.

³ Story on Con. § 636.

⁴ 2 Kent, 556. 22 Wend. 148. 6 Seld. 207. 21 Barb. 398. *Infra*, § 1421.

⁵ Story on Con. §§ 677, &c. *Infra*, § 1422.

⁶ Story on Con. § 647, &c. See generally as to this section, *infra*, §§ 1420, &c.

[§ 109a.] The execution and delivery of a written contract, merges all prior negotiations and agreements, verbal or written, relative thereto, and parol evidence is inadmissible either to show the terms of the former one, or that it was agreed it should remain as a subsisting contract.¹ If, however, the written contract is only in part execution of the prior one, as if it contained several distinct provisions, and the subsequent one covers a part only of them, then the prior one is merged to that extent only, and is a subsisting one for the remainder thereof.²

§ 110. When the obligations of the parties are determined by the interpretation of the agreement, whether there has been a failure by one party to perform them, is a question of fact to be determined by evidence, and, unless the contract provides for the amount of damages to be paid in case of default, they are also to be ascertained from evidence, subject to certain rules, which will be noticed in a subsequent portion of this work.

§ 111. Contracts upon which actions can be brought for the recovery of money only, in addition to those mentioned in the preceding section, include every description of agreements by which one party has undertaken to do or not to do, or that another shall do or not do, a particular thing, or that a particular fact is or is not so.

§ 112. It was remarked in the former part of this chapter, that a slight consideration is sufficient to sustain a contract, and that the least benefit to the defendant or loss to the plaintiff is sufficient, within the rule.³ Instances illustrative of this are everywhere scattered through the books. A few decisions additional to those before given are found in the notes.⁴ A submission to arbitration is a good consideration for the contract to abide the award, if the promise to submit is made by both parties at the same time; otherwise it is void.⁵ So, if I agree that if you will come from a foreign government I will not sue you,⁶ or that if you will enter upon A's land, which I claim, I will indemnify you.⁷ In all these and similar cases, there is some benefit to the promisor (or to some third person at the promisor's request, as in 1 *Caines*, 45), or harm, or expense, or loss of some kind to the promisee; and wherever these or either of them

¹ 2 Kern. 561. 24 Barb. 39. 26 id. 9. ⁴ 1 *Caines*, 45. 3 John. 104. 14 id. 466.
37 Ill. 216. 46 id. 47. 17 Mich. 308. 23 19 Barb. 106. 5 Cranch, 142.
Ind. 56. 24 id. 199. 15 Iowa, 387. Id. 450. ⁵ 3 *Caines*, 166. 12 John. 397. 20 N.

² 2 Kern. 561. 16 N. Y. 532. 41 Barb. Y. 204.

619. 45 id. 171.

⁶ 2 Aik. 338.

³ Ante, §§ 25, &c.

⁷ 2 John, Cas. 52.

exist, there is a sufficient consideration for any, the most onerous, agreement.¹

§ 113. Mutual promises *made at the same time* furnish good considerations for each other, unless the promise upon one side is void; as a promise to do an unlawful act.² But if the promise of one party be *voidable* only, as the promise of an infant to marry, the consideration is sufficient, and the infant can maintain an action for its breach, although his infancy would be a good defense to an action by the adult.³ But if the agreement of one of the parties is to do, in a few days, what he is in law bound to do at the very time he makes the promise, it is not a sufficient consideration for the agreement of the other.⁴

§ 114. A promise by one to pay another twenty dollars for a cow, is a good consideration for a promise that he will deliver her for that sum; but neither party can maintain an action upon the contract without showing his own performance, or a tender of performance, which is equivalent to it.⁵ So, where a statute provided a premium for the producer of the best article of a certain description, and two producers, who were seeking to obtain it, mutually agreed that if either of them received it he should divide it equally with the other, the contract was held binding.⁶

§ 115. It has been stated⁷ that a moral obligation not founded upon a previous legal or equitable obligation, is not a sufficient consideration for a contract. But where one for my accommodation gave his note to A, and you purchase it of A, a promise subsequently made by me to pay it to you is good, on the ground of my prior equitable obligation.⁸ And where I have a judgment against one, and he delivers to me a pledge to secure it, and I sell the pledge upon execution, promising to pay what it sells for beyond satisfying the judgment, the consideration is a good one for the promise.⁹ So, if I pay money for the benefit of another, his subsequent promise to repay me is good.¹⁰

¹ 1 Story on Con. §§ 431 to 434. 32 Ill. 357.

² Story on Con. §§ 447, 448. 4 Coms. 249. 41 Mo. 389; but see 3 Seld. 349, where it is held that this rule "is confined to cases where the want of mutuality would leave one party without a valid or available consideration for his promise," and that if A. agrees with B. that he will pay certain notes upon which he is endorser, but not yet matured, and in consideration thereof B. agrees to pay

him a certain sum, although the agreement does not bind A. to pay the notes, if he does do it, he may recover of B. on his promise.

³ Story on Con. § 449. 7 Cowen, 22.

⁴ 25 N. Y. 189. 40 Barb. 512.

⁵ 2 Kent, 465.

⁶ 8 John. 304.

⁷ Ante, § 25.

⁸ 2 Caines, 150.

⁹ 11 John. 533.

¹⁰ 25 Ind. 253. 41 Mo. 302.

§ 116. A promise made by the owner of land to a trespasser, who had made improvements thereon without the owner's knowledge, to pay him for the improvements, is void as being without a sufficient consideration.¹

§ 117. Where A claimed a sum of money of B, who denied it, but promised to pay it if A made oath that it was due, the fact that A made the oath was held a sufficient consideration for the promise to pay, and B was not permitted to show either that A swore falsely or was mistaken.² But where a claimant offers to be satisfied if the other party will swear that nothing is due, or to a state of facts showing that nothing is due, and the latter makes an affidavit to that effect, the action is barred by the affidavit, irrespective of its truth; and in such case it is not necessary that the affidavit be given up to the claimant. He is entitled only to an inspection of it.³ If, however, it is agreed that a certificate given by a third person shall be evidence that a claimant is entitled to payment, that certificate is not conclusive, and may be shown to be a fraudulent one.⁴ An agreement to receive of A and pay notes of a certain bank, whereby A was induced to take them, was sustained as made for a good consideration, for all A had taken up to the time of the failure of the bank.⁵

§ 118. A promise by the holder of a note, or by any other creditor, to extend the time of payment, or to forbear to sue a note or demand then due, if without some new consideration, is void, and even the payment, at the time, of a part of the debt, is not a sufficient consideration for such a promise.⁶ If, after a suit is brought for money then due, the plaintiff promises to discontinue the suit on the defendant's simple agreement to pay the amount in a few days, that promise is void.⁷ An agreement between the holder and maker of a note payable on demand, with interest, that the maker will pay interest semi-annually, and shall not pay the principal until he wishes to, is also void;⁸ and so is a promise to pay a smaller sum than is due, even, it seems, where the promise is reinforced by additional security from the debtor's own means; but if a third person gives the additional security, it would be good by way of accord and

¹ 5 John. 272, and see *infra*, § 123; 389. 2 Hall, 185. 25 N. Y. 189. 30 *id.* also, 32 Ill. 206. 474. 33 *id.* 648. 28 Barb. 96. 5 Duer, 202. 22 How. Pr. R. 421. 12 Abbott, 33.

² 18 John. 337.

³ 15 Abbott, 341.

⁴ 2 Hall, 239.

⁵ 2 Hall, 477.

⁶ *Supra*, § 26. 12 John. 426. 19 Wend.

335. 14 Ind. 401.

⁷ 40 Barb. 512.

⁸ 10 Bosw. 369.

satisfaction.¹ An agreement to forbear the payment of a debt in consideration of a usurious premium is void,² and so is one made before the claim is due to extend the payment, if, when it becomes payable by its original terms, the debtor will pay a portion thereof, or pay damages for the detention of a certain sum of money, beyond the amount detained.³ But if the debtor furnishes additional security for the debt, or for other debts owed to the same creditor; or pays expenses in other matters; or takes up the old note and gives a new one in its place, payable at a different time; or makes a payment upon the debt before it is due; or pays a part of the amount, with the costs of a suit brought to recover it, the judgment not yet being entered; it is otherwise, and there is a sufficient consideration for an agreement to extend the time of payment of the debt, or any other agreement relative thereto not forbidden by law;⁴ and so, if a creditor agrees with a third person to accept less than his demand, for a debt owed him, that agreement is a valid one, and may be enforced.⁵

§ 119. The voluntary restoration of that which the law will compel one to restore,⁶ the relinquishment of a void promise, a discharge from arrest, an agreement to commit or conceal a crime, to violate one's duty as a public officer, or to do an act which is immoral, will not furnish a valid consideration for a contract.⁷ But a promise to indemnify one against the consequences of an unlawful act already done is valid; thus, a bond to a sheriff to indemnify him against a voluntary escape which has already happened is good.⁸ And so, while a promise to pay a sum in consideration of future prostitution is void; one to pay a sum for having debauched a woman is sustained, on the ground that an injury had been inflicted upon her which the promisor should indemnify her for.⁹

§ 120. Relationship or natural affection, although a sufficient consideration for a gift or grant,¹⁰ is not sufficient to support an executory contract, as a note or covenant to pay money.¹¹

§ 121. Where one buys goods for money which is not paid, and there is neither earnest money given nor a delivery, no action lies

¹ Lalor, 59. 33 N. Y. 648. 2 Duer, 413.

² 1 Comstock, 274. 5 Duer, 202.

³ 2 John. 442. 1 Wend. 317.

⁴ 25 Barb. 175. 30 id. 395. 34 id. 444.

⁵ 43 Barb. 577.

⁶ 2 Cowen, 183.

⁷ 1 Story on Con. §§ 569, 571, 572.
Roll. Abr. 16, pl. 39. 19 Wend. 188,

⁸ 1 Caines, 450. 14 John. 378. 2 Hall, 579.

⁹ 4 Denio, 439. 13 Barb. 92.

¹⁰ 9 Barb. 487.

¹¹ 18 John. 145. 2 Seld. 342. 9 Barb. 487.

for the money or goods.¹ So where I give you the refusal of goods at a certain price, for a certain time, and you give me notice within the time that you will take them, this does not bind me, for you not being bound to accept the offer, there was no consideration for my promise.² So where one agrees gratuitously to build a house or to insure for another and neglects it, no action lies, even though special damage ensued.³ It would however be otherwise, if the carpenter or insurer had entered upon the work.⁴

§ 122. A verbal permission to one to pass and repass over my land is a mere license, and will not prevent my withdrawing the license and fencing up the passage.⁵ The death of the licensor or his conveyance of the land to another will, in law, revoke such a license,⁶ but it is effectual to justify everything which may be done under it prior to its revocation, except, indeed, injuries to the lands resulting from carelessness or unskillfulness in the licensee.⁷ Such a license given without limitation as to time, is deemed to continue until a revocation is shown, and never would, of itself, ripen into a permanent right to enjoy it.⁸

§ 123. As seen at section 27, where the consideration be wholly executed before the promise is made, it is not sufficient, unless it arose at the *request* of the party making it, or was so clearly beneficial to the party promising that a request may be implied from the moral obligation to make one. For the general rule is, that I shall not without a request, do you a kindness and afterward charge you for it, even though you then promise to pay for it. As if I, without your knowledge, save your property from fire and you afterward promise to pay me for my trouble.⁹ But, as we have said, where the circumstances under which the service is performed show a strong moral obligation to make the request, one is implied. As where one, without cause, expels his wife or child from his house, and another furnishes them necessaries; where, during the absence of A his wife or child dies and B buries her and A promises to pay for the service; in these and similar cases, the jury may infer a request in order to support the express promise.¹⁰ Where the service

¹ Dyer, 30, a. Shep. Touch. 224.

⁵ 35 Barb. 162.

² 3 Term R. 653.

⁷ 6 Hill, 61. 2 Seld. 279. 29 N. Y.

³ 2 Ld. Ray. 919. 5 Term R. 143.

⁴ 634. 34 id. 20.

John. 84. 20 id. 379.

⁶ See 21 N. Y. 118.

⁴ 2 John. Cas. 92, 95. Edw. on Bail.

⁹ 20 John. 28. 41 Mo. 302.

98, 99.

¹⁰ Story on Con. § 474. 1 H. Bl. 90. 1

⁵ 10 John. 246. Infra, §§ 141, &c., 506, &c. 38 Mo. 588. 32 Wis. 550.

Caines, 585. 7 John. 87. 10 id. 243. 14 id. 188.

which forms the consideration was performed at the request of the party, the circumstance that the promise was subsequently made does not affect it. As where I perform a service at your request and you afterward promise to pay me a certain sum for it the promise is good.¹ If I am compelled to pay the debt of a third person, being his surety, or otherwise liable, in law, to do it, his subsequent promise to repay me is binding, but if I am not under any legal obligation to do it, and make the payment voluntarily, the subsequent sanction and adoption thereof by the debtor would not sustain an action; whether an express promise would be sufficient is doubtful, but it would probably be held to be so.²

§ 124. A consideration partly executed at the time of the promise and completed afterward will support it, though it be begun and completed without the request of the party promising. Such are called *continuing considerations*. As where one married a maid who lived in the plaintiff's house, and about the middle of the year promised him that if she remained for the year he would pay for her board for the whole year, past as well as future.³

§ 125. The consideration may come from a third party, and the agreement itself may be made between two persons for the benefit of a third, who may maintain an action upon it if he adopts it, though he was not privy to the consideration nor cognizant of the promise when made; as where, in consideration that you will contract with A to deliver him a horse, I will pay you the price, or I loan money to a person who promises to pay it to the plaintiff to whom I am indebted in that amount. In such a case, although the plaintiff knew nothing of the matter till afterward, he may recover upon the agreement.⁴

§ 126. Actions can be maintained on valid subscriptions to the stock of corporations, or for other purposes, and this although another remedy is given by statute, as a forfeiture of the shares and all previous payments.⁵ Conditions may be inserted in these papers, unless forbidden by statute or against public policy, as that they are not to be binding unless a specified sum is subscribed, but it is essential that these be applicable alike to all the subscribers, and any made

¹ 1 Roll. Ab. 11 pl. 6.

53 id. 61. 6 Duer, 564. (See 33 Barb. 194.

² 1 Parsons on Con. 394, &c. 20 Barb. 151.

38 id. 262.) 18 Ind. 114. 19 id. 40. 20 id. 163. 24 id. 318. 19 Iowa, 187.

³ 1 Com. on Con. 24, 25. 1 Story on Con. § 477. 3 Bulst. 187.

⁴ 9 John. 217. 4 Kern. 336. 16 N. Y. 457, n. 30 id. 64. 17 Barb. 567. 18 id.

⁵ 2 Denio, 45. 20 N. Y. 268. 24 id. 178. 27 Barb. 82. 40 id. 119. Id. 225.

297. 21 id. 56. Id. 541. 31 id. 323.

in violation of this rule, which may be shown by parol, are not valid nor to be counted as against the others.¹ A person may erase his name from a subscription if it is done before it leaves his possession, or is filed when filing is necessary,² and although the charter requires a payment at the time of making the subscription a payment afterward will make it valid.³ If at the time of signing, the charter of the company with all its privileges has been revoked and annulled, without the knowledge of the subscriber, his subscription is without consideration and void,⁴ and so is one to the preliminary subscription for the formation of plank roads under the New York general act of 1847; those only who subscribe the articles of association of these companies are entitled to stock or compellable to pay for the same; the same rule applies to railroad subscriptions under the law of 1848.⁵ A bond, or a promissory note, or renewals thereof, given in payment for subscriptions is valid.⁶ If a person who has subscribed for stock, subsequently, and before it has been paid for, transfers it in good faith to a third person, with the assent of the corporation, the assignee becomes liable for the unpaid balance, and the original subscriber is exonerated therefrom.⁷ So far we have spoken only of valid subscriptions, or of those void on account of some illegal condition. The question when subscriptions are valid as founded on a sufficient consideration, is one of much practical difficulty. The case of the *Trustees of Hamilton College v. Stewart*,⁸ holds that the endowment of a literary institution is an insufficient consideration, although there is annexed a provision that the subscription shall not be binding unless a certain amount is raised, there being no express or implied request therein that the institution shall perform the services and incur the expenses necessary to fill up the subscription; in other words, that there was no mutuality and no liability or expense to be incurred at the express or implied request of the subscribers.⁹ But the law seems to be clear, that if the subscription contains, or the subscriber's acts amount to a request, express or implied, that a corporation or association then or to be formed, incur liabilities or make expenditure, or do anything on the strength thereof, then, if the subscription is subsequently accepted by the corporation, or those

¹ 15 N. Y. 583. 31 id. 273. 18 Barb. 297, 317. 24 id. 199. 28 id. 59. 29 id. 310. 24 id. 518. 32 id. 616.
² 28 Ind. 344. 15 Ohio N. S. 235. Id. 24 Barb. 301. 30 id. 246. 31 id. 323.
³ 16 id. 20. 35 Ill. 518. 46 id. 377. 25 Barb. 413.

⁴ 21 Barb. 56. 24 id. 518.

⁵ 16 N. Y. 451. 25 id. 208. 28 Barb. 254.

⁶ 29 Barb. 579.

⁷ 1 Comstock, 581.

⁸ 20 Barb. 159.

for whose benefit it was made, and the expenditure is made, or liabilities incurred, or labor done, the several subscriptions become binding, and can be collected of those making the same.¹ If the paper provides for the payment of the amount to a person to be elected at a certain time by a certain body, an election at a subsequent time is sufficient;² if it contains conditions these may be waived by the conduct of the subscriber;³ in the case of corporations, the subscribers are not released by subsequent amendments of their charter made by the legislature;⁴ and if payable to any particular person, he may incur the liability, or do the work and make the expenditure, and sue for the subscriptions.⁵ A stock subscription may be made payable before the full capital is subscribed.⁶

§ 127. In New York the following classes of contracts, or some note or memorandum thereof, are by a statute ordinarily denominated the statute of frauds, required to be *in writing*, and to be *subscribed by the party* to be charged therewith, viz.:

1. Every agreement that by its terms is not to be performed within one year from the making thereof.

2. Every special promise to answer for the debt, default or miscarriage of another person.

3. Every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry.⁷

Another statute adds a fourth class of cases, which are not only like the others to be in writing and subscribed by the party to be charged therewith, but in addition the agreement, or the note or memorandum thereof *must express the consideration*, a necessity that existed as to the other cases also until the law of 1863. This fourth class is as follows:

4. Every contract for the leasing for a longer period than one year, or for the sale of any lands or any interest in lands.⁸

If part of an entire contract is void under this statute, the whole is.⁹

[§ 127a.] What was said at sections 90 and 91 relative to the form of the memorandum required by the statute referred to at section 88,

¹ 2 Kern. 98. 21 N. Y. 234. 34 id. 379. ⁶ 21 Barb. 56.

28 Barb. 59. Id. 254. 29 id. 335. 36 id. ⁷ 2 R. S. 135, § 2. 3 id. (Banks' 5th ed.) 576. 37 id. 535. 38 id. 221. 43 id. 220. 221. 4 id. 644. Laws of 1863, ch. 464, p. 44 id. 547. 46 id. 235. 12 Mich. 73. 25 802.

Ill. 292. 13 Wis. 546.

² 40 Barb. 72.

³ 29 Barb. 385.

⁴ 26 N. Y. 112. 21 Barb. 454.

⁵ 44 Barb. 547.

⁸ 2 R. S. 132, § 8. 3 id. (Banks' 5th ed.) 220. See 36 Mo. 534, for the rule as to this class there.

⁹ 36 N. Y. 537. 2 Transcript 371.

its subscription, and that by an agent or auctioneer, apply as well to the cases now under consideration, except that as this statute requires that the memorandum be signed only by *the party* to be charged therewith, it is sufficient that it be signed by but one of them, being the one to be charged, instead of both, as in the former instance.¹ While an authority to an agent to *convey* real estate by deed must be under seal, an authority to *contract* for the sale thereof may be by parol; and that authority may be inferred if the principal afterward adopts and ratifies the contract made for him by the agent. The contract to sell must be signed by *all* the vendors in person or by their agents.²

Although under the old statute prior to the Revised Statutes, when as now the consideration was not required to be given, the courts still held it necessary that it be inserted, because "the agreement" was to be in writing;³ yet following the evident intention of the legislature in striking the clause out of the Revised Statutes, the courts now hold that the consideration need not be expressed.⁴ It is yet necessary, however, in the cases specified in the fourth clause, that the memorandum express the consideration, and the words "for value received" are sufficient for this purpose.⁵ A telegram delivered by a party or his agent to, and forwarded by a telegraph operator to the party claiming under it, is a sufficient memorandum under this statute.⁶

§ 128. Under the FIRST CLASS of contracts mentioned in the last two sections, it is held that to bring an agreement within the statute, it must be one that *cannot* be performed within a year, although the performance is to be commenced within that time.⁷ But if it *may* be performed within the year, it is not within the statute, and is valid.⁸ If an agreement is void because within the statute, and it has been fully performed on one side, and that performance accepted by the other party, a recovery may be had against him for the value of that which he has received, but not on the contract itself.⁹

¹ 1 Seld. 229, and refs. 4 Kern. 584. 24 548. 44 id. 162. 52 id. 501. 4 Bosw. N. Y. 57. 39 Barb. 620. 354. 2 Barb. Ch. 221. 2 Hilton, 116. 5

² 53 Barb. 17.

³ 3 John. 210. See 21 N. Y. 616.

⁴ 37 How. Pr. R. 315. 6 Abbott, N. S. 309. Also in Indiana, 28 Ind. 53.

⁵ 23 N. Y. 495, and refs. 2 Keyes, 589. 8 id. 161.

⁶ 35 Barb. 463.

⁷ 7 Cowen, 263. 5 Hill, 200. 3 id. 128. 541.

⁸ 1 Denio, 602. Id. 606. 2 id. 87. 31 Barb.

Wend. 204. 13 id. 307. 35 Ill. 22. 23 Ind. 223.

⁹ 2 Kent, 510, note. 10 John. 244. 10 Wend. 426. 15 id. 336. 3 Hill, 128. 19 N. Y. 305. 35 Barb. 573. 6 Ind. 252. 23 id. 223. 21 Wis. 415.

¹⁰ 44 Barb. 162. See 35 Ill. 22, 41 Vt.

§ 129. Under the SECOND CLASS, promises to answer for the debt, default or miscarriage of another, it is held that the general rule is, "that all promises to answer for the debt or default or miscarriage" of a third person, must be in writing, whether the promise be made before, at the time, or after the debt or liability is created. The statute makes no exception of any promise which is of that character. But a considerable variety of undertakings, having points of resemblance and analogy to such promises, have been held not to be within the statute. These may be chiefly if not wholly arranged in the following classes: 1. Where there was no original debt to which the auxiliary promise could be collateral; for example, where the promisee was a mere guarantor for the third person to some one else, and the promisor agrees to indemnify him, or where his demand was founded in a pure tort. 2. Where the original debt becomes extinguished, and the creditor has only the new promise to rely upon; for example, where such new undertaking is accepted as a substitute for the original demand, or where the original demand is deemed satisfied by the arrest of the debtor's body, or a levy on his goods, the arrest or levy being discharged by the creditor's consent. 3. Where, although the debt remains, the promise is founded on a new consideration which moves to the promisor. This consideration may come from the debtor, as when he puts a fund in the hands of the promisee, either by absolute transfer or upon a trust to pay the debt, or it may be in his hands charged with the debt as a prior lien, as in the case of *Williams v. Leper* (3 Burr. 1886), and many others. So the consideration may originate in a new and independent dealing between the promisor and the creditor, the undertaking to answer for the debt of another being one of the incidents of that dealing. Thus, A, for any compensation agreed on between him and B, may undertake that C shall pay his debt to B. So A, himself being the creditor of C, may transfer the obligation to B upon any sufficient consideration, and guarantee it by parol.¹ Accordingly, the plaintiff having a boat in his hands owned by A, upon which he had a lien for repairs, delivered it to A at the defendant's request, and upon his verbal promise to pay the amount of the lien, but no new consideration moved to the defendant; held that his promise was void by this statute.²

§ 130. It would be impractical, if it were possible, to give all the cases upon this clause of the statute. A few, however, may be given,

¹ 21 N. Y. 412, where a large number of

² Id.

cases is cited and commented on, and their appropriate places assigned.

illustrative of the various classes enumerated in the previous section. Among those which are void unless in writing, are these: Where a salesman promised his employer that if his personal friends did not pay for goods they purchased, he would, and they subsequently bought goods which were charged to them;¹ or one promises to indemnify the promisee for becoming security for a third person² (although it is admitted that this contravenes one of the rules as laid down in 21 N. Y. R., already referred to). Or A employs B to build a house for him, agreeing to pay him therefor in C's notes, and gives him an order on C for them, which C endorses, "accepted;"³ or A requests B to sell goods to C, promising verbally to endorse C's notes for the price;⁴ or the promise places the promisors in the position of sureties for the debt, so that if they make the payment they will be creditors of the promisee;⁵ or a third person verbally guarantees the payment of a promissory note, or its collection;⁶ or a promise to pay the debt of another, in consideration of forbearance to sue the debtor, if the agreement leaves the debt subsisting against him;⁷ or to pay accruing rent;⁸ or to indemnify one against endorsements he has made for a third person, or that he may make thereafter;⁹ or by B to pay for goods sold to A, and on his credit, B promising to see that they are paid for;¹⁰ or by a father to pay for goods sold to his minor son, if the son does not pay for them;¹¹ or by the owner of a lot to pay for building materials already furnished by the plaintiff to a party holding a contract for the land, and put into a house erected by such party;¹² or to pay for labor then commenced and being performed for a third person.¹³ In these and cases similar to them, where, under whatever disguise or state of facts, the agreement is to answer for the debt of another, or for his default or miscarriage, the same is within the statute, and is void unless in writing, subscribed by the party to be charged, and also (except in New York), expressing the consideration. But if A hires B to do work on his, A's, premises, and B

¹ Daly, 213.

² 4 Barb. 131. 21 How. Pr. R. 444 S. C. 12 Abbott, 313.

³ 1 Sand. 14. 5 Bosw. 100. *Contra*, since law of 1863.

⁴ 5 Hill, 483.

⁵ 2 Bosw. 392.

⁶ 15 Wend. 343. See 25 Iowa, 289.

⁷ 20 Wend. 201. 4 Denio, 275. Id. 559. Lalor, 47. See 3 Barb. 209. 8 John.

29.

⁸ 4 E. D. Smith, 173.

⁹ 4 Denio, 559.

¹⁰ 1 Duer, 199.

¹¹ 13 Wend. 122.

¹² 5 Seld. 435. See also 2 E. D. Smith, 411.

¹³ 14 Wend. 246. 14 Barb. 570. See How. Court of Ap. Cases, 22, 28. 34 Barb. 97. 19 id. 259. 45 id. 169.

employs C to do it, who commences, and then refuses to complete it unless A will promise to pay him, and he does so promise by parol, whereupon C finishes the job, A's agreement is not within the statute.¹

§ 131. Among the cases which are not void, as arising under the first class of the cases which are valid, as given in section 129 *supra*, are cases of suretyship, as where two persons were sureties, and one of them agreed by parol to indemnify the other from loss.² So also are cases where the debt is in reality that of the promisor, and not of a third person, which will be more particularly referred to in a subsequent section; also, where one agrees to indemnify another for subscribing towards a minister's salary.³

§ 132. Among those which have been held to be valid under the section class of the cases as given in section 129, these may be mentioned: Where a judgment debtor delivers property to the promisee, who in consideration thereof promises to pay the creditor twenty-five dollars if he will discharge his execution, and it is done;⁴ or an officer releases a levy on the parol agreement of a third person to pay the amount;⁵ or by an arrangement and transactions between the parties, a mortgage given by a third person is to be treated as paid and satisfied by the new promise;⁶ or the new promise is such that the promissors become the debtors, the old debt being extinguished.⁷ So if A sells goods to B, who being unable to pay, sells them with A's consent to C, who promises to pay A for them, the debt becomes C's; and his promise is good;⁸ or if A agrees to pay the debt if an execution creditor will discharge his debtor from arrest;⁹ or a creditor, in consideration of a third person's promise to pay the debt, gives up a lien of any sort upon goods.¹⁰ In these and similar cases the agreement is valid, although not in writing, nor subscribed by the party to be charged therewith.

§ 133. The following cases are embraced under the third class of the cases spoken of in section 129: A debtor conveys land to the defendants, who in consideration thereof promise to pay a debt owed by him to

¹ 34 Barb. 97. Id. 252. See also 45 id. 169.

² 10 John. 242. 4 Wend. 657. 2 Kern. 462.

³ 17 John. 113.

⁴ 8 John. 376.

⁵ 17 Barb. 141. Also 10 Wend. 461. 20 id. 184.

⁶ 2 Bosw. 206.

⁷ 2 Bosw. 392 and refs. See 19 Ind. 142.

⁸ 5 Taunt. 450.

⁹ 1 Barn. & Ald. 297.

¹⁰ 3 Esp. 86. 7 John. 463.

the plaintiff, with other debts, and they so inform the plaintiff;¹ B owes the plaintiff and puts money in the defendant's hands, who in consideration thereof agrees to pay the debt;² B who owes A, sells fifteen tons of hay to the defendant who thereupon agrees to pay B's debt to A;³ a person owing a debt, transfers a note in payment thereof endorsing a guaranty which expresses no consideration;⁴ (this now would be good in New York, since the statute of 1863 before referred to); a person on making a purchase agrees to deliver in part payment, the chattel note of a third person, saying the maker is good and he will warrant that the holder will get the chattel when the note becomes due.⁵ A loaned money to the defendant who promised to pay it to the plaintiff, in discharge of A's debt to him;⁶ these and similar cases are not within the statute of frauds, and need not be in writing nor subscribed by either of the parties. If, however, the property is secured by the promisor from the debtor merely to indemnify him for making the promise to pay the debt, or to be used for that purpose, the promise is void, the rule being that in making the payment pursuant to the promise, the party must be primarily discharging his own debt, while incidentally satisfying that of the debtor.⁷ It is held in California that the guaranty of a promissory note need not express the consideration.⁸

§ 134. Although the rules above laid down embrace nearly if not every variety of cases that can arise under this clause of the statute, yet a further reference may be made to some of the decisions upon one of the heads. If, as we have before said (section 131), the debt is in reality that of the promisor, his agreement does not come within the statute.⁹ Thus, A said to the printer of a newspaper: "If my nephew should call for papers I will be responsible for the papers he takes." The nephew took the newspapers, the printer making no charge for them against either A or the nephew. It was held that the promise was an original undertaking upon which A was liable, and was never the debt of the nephew.¹⁰ So when a person wrote to a trader to let his brother have goods and charge them to himself, it was held that the debt was that of the promisor.¹¹ This case may be also sustained on the other ground, that the agreement was in writing

¹ 10 John. 412. See also 35 Barb. 151.

² 18 John. 12. 2 East. 325.

³ 4 Cowen. 432. 9 id. 639. See also 5 Wend. 23. Id. 235. Id. 277.

⁴ 2 Comstock, 225.

⁵ 21 N. Y. 336. 35 Barb. 143. 38 id. 432

⁶ 20 N. Y. 268.

⁷ 12 John. 291. 2 Bosw. 397, 398; but see 129, sub. 3, supra.

⁸ 34 Cal. 673 and refs.

⁹ 25 Ind. 453. 15 Mich. 292.

¹⁰ 17 John. 114; also a similar case. 19 Wis. 231.

¹¹ 1 Duer. 206.

and properly subscribed, and was therefore valid in New York, and even in those other states where the consideration must be expressed, the consideration being the furnishing of the goods at the request, express or implied, of the promisor, and that sufficiently expressed in the writing.¹ So when a physician was requested by the defendant to attend professionally upon a third person, the defendant promising to pay him therefor, and the services were performed on the credit of such request and promise, which were by parol, it was held that the defendant was liable.² In these and cases of the same character the sole credit is given to the promisor, and the debt is his alone. But if any credit is to be given to any other person, as if I tell A that if he will sell an article to B upon credit I will see it paid, my contract is void, for it supposes a credit to B which I guaranty. If A sells goods to B, on C's application and promise to see them paid for, but they are charged to B and payments which C makes are paid and accepted as on B's debt, it is held that the debt is B's, the credit having been given to him, and C's promise to pay it is void.³ It is a question of fact in these cases, whether any credit was given to another person. If it appear that the goods were charged to the third person and not to the promisor, it is strong, but not conclusive evidence against the plaintiff that the promisor was but a surety.⁴

§ 135. Another class of cases arising under this law, but which are valid, are those in which, for the purpose of paying one's own debt, he transfers the note or other obligation of a third person and promises to see it paid; as where the plaintiff, at the request of the defendant, pays the defendant's debt, who, for the purpose of repaying it, transferred to the plaintiff the note of a third person, undertaking at the same time that it would be paid;⁵ or on a similar principle, where A is indebted to B, and C to A, A transfers C's debt to B, to whom C promises to pay the amount, the agreement is valid, though not made as required by the statute of frauds;⁶ so, if the defendants buy goods of the plaintiff and in part payment transfer to him the note of B, with a guaranty expressing no consideration, and also verbally representing that the note is good;⁷ or if, in the purchase of land, the purchaser agrees to pay a mortgage thereon, as a part

¹ 3 Comstock, 203. 3 Kern. 232, 238. and refs. See also 6 Rand. 508. 7 Har. & 21 N. Y. 315. J. 391.

² 1 Bosw. 441.

⁵ 4 Hill, 178.

³ 1 Duer, 199, 1 Edmond's Sel. Cas. 100.

⁶ 3 Barn. and C. 842.

⁴ 2 Stark Ev. (6th Am. Phil. ed.) 345

⁷ 21 N. Y. 336. 35 Barb. 143. 38 id. 432.

of the consideration;¹ these are but instances of an agreement to pay one's debt in a particular manner, and therefore not within the statute.²

§ 136. The signature of sureties to an instrument so drawn as to express an obligation to pay on the part of the principal alone, is held an effectual promise within the statute, as a blank endorsement, or a signature to a promissory note.³

§ 137. A being insolvent, a verbal agreement was made between B and several creditors, whereby B agreed to pay the creditors ten shillings in the pound in satisfaction of their debts, which they agreed to accept and to *assign their debts* to B. This was held an original contract to purchase the debts.⁴

§ 138. Under the THIRD CLASS, as given in section 127, it has been held that an ante-nuptial agreement to support the daughter of the wife is void, unless in writing, and (except in New York) expressing the consideration.⁵ The terms of the statute expressly extend it only to pay money or perform some act in consideration of the marriage. A promise contained in a letter, to give a certain fortune with one's daughter in marriage, is a sufficient contract within the statute.⁶ If there is an oral agreement to make a settlement in consideration of marriage, it is not valid, and if such settlement be made by a husband indebted at the time, it is fraudulent and void as against his then creditors; but if the intended wife agrees by parol, in consideration of the marriage and settlement, to discharge the intended husband's debts, and she does so, then his settlement is good as to his subsequent creditors.⁷

§ 139. Under the FOURTH CLASS, as given in section 127, verbal agreements for the purchase of *growing* timber, grass or fruits,⁸ and for the sale of a pew in a church,⁹ are within the statute and void. A verbal lease for a term not exceeding a year, although it is to commence at a future day, is good;¹⁰ and so is a verbal contract to sell hops or other growing crops. The reason of a different rule in the latter case from that where growing timber, grass or fruits are sold is, they being the natural products of the soil are considered real

¹ 10 How. Pr. R. 97. 10 Bosw. 226. ² 2 Kent, 440, &c. 32 N. Y. 629. 16 Barb. 136.
³ 38 N. Y. 187. ⁴ 1 Denio, 550. 6 Seld. 114. 4 Keyes, 180. 1 Barb. 542. 12 id. 685. 50 id. 302.
⁵ 2 Hill, 63. 21 Barb. 218. 28 id. 444. ⁶ 27 How. Pr. R. 327. 4 Kansas, 426.
⁷ 4 Bos. & P. 124. See 5 Wend. 598. ⁸ 11 Paige 257. ⁹ 16 Wend. 28. 8 Barb. 130. 34 id. 16.
¹⁰ Com. on Con. 72 to 75. See 2 Story on Con. § 101, i. ¹¹ 1 Seld. 463. 41 Barb. 186.]

estate, while growing crops that are the annual produce of labor and cultivation of the earth are personal estate.¹ It was held in an early case that a verbal agreement to extend the time for performing a contract for the sale of land is within the statute and void.² But subsequent decisions seem to controvert this position and explain the decision as made on another ground.³ A promise to pay for land sold and conveyed to the defendant is not within this statute, and therefore need not be in writing;⁴ even where the payment is to be made by the vendor's assuming and paying certain debts owed by the vendor to third persons, or incumbrances already existing against the land;⁵ but if there is only a verbal bargain for the sale of the lands, no writings having been executed on the subject, the bargain is void;⁶ and so is an oral agreement to exchange lands. But if the agreement has been executed by the one party, and the other has accepted and retained the benefit thereof, he cannot afterward refuse to perform on his part, on the ground of the invalidity of the contract.⁷

Owners of land cannot by parol make a new division line different from that made by their deeds, even if possession is taken under the agreement; but practical location and acquiescence for a long period, as for forty years, will establish that as the true line, even though it is erroneous and was originally made under an agreement resulting from a mutual mistake as to facts.⁸

A broker, authorized only to close a bargain for the sale of real estate, is not authorized to sign his principal's name to the contract for its sale.⁹

A sale of lands by a sheriff on an execution is within the statute of frauds;¹⁰ but it seems one by a referee, on a judgment in foreclosure is not, and that therefore no writing need be executed in such a case by either party.¹¹

§ 140. There is a variety of property attached to a freehold which is so fixed as to be in readiness to be severed, and capable of being separated from it without violence, which the courts hold may be sold without a written contract; such as mill-stones, granite, and so,

¹ 9 Cowen, 39. 1 Denio, 550. 36 Barb. 415. 4 Ind. 146. 10 id. 375. 15 id. 483. 19 Ill. 631. 11 East. 362. See 41 Ill. 466. 23 Ind. 56.

² 15 John. 200.

³ 24 N. Y. 367. 12 Barb. 370. 20 id. 64.

⁴ 2 Kern. 304. 28 Vt. 358. Id. 721. 18 Ind. 133. 14 Mich. 238.

⁵ 2 Nevada, 133. 1 id. 360.

⁶ 17 Barb. 614.

⁷ 4 Comstock, 403. 41 Bar. 619. 18 Ind. 133. 17 Ohio, N. S. 262.

⁸ 16 N. Y. 354. Id. 359.

⁹ 18 Barb. 60.

¹⁰ 8 John 520. 23 How P. R. 486.

¹¹ 26 How. Pr. R. 325.

probably, buildings and fixtures. When the owner sells them as personal property, the law so regards them. But it must be a sale contemplating an immediate severance of them from the freehold in their present condition.¹ If the owner severs fixtures from the realty, they become personal property, and may be seized or sold as such.²

§ 141. A verbal agreement to pay for improvements upon lands is binding, it not being to pay for an interest in the lands, but for work and labor bestowed upon them.³ But a contract for a possession of lands, or a permanent right to enter them for a particular purpose, as to dig coal, maintain an embankment, to pass over them with teams, to flow them by a pond, or any similar use of them, is within the meaning of the statute. Such rights when granted are termed *easements* or *servitudes*. They can only be created by written contracts or by implication of law, as by an uninterrupted use of the right for a period of twenty years.⁴

§ 142. A contract to pay for a mere *license* to enter upon another's lands for a particular purpose, without any permanent right being contemplated, is not within the statute, as it involves no interest in the freehold, and is not assignable.⁵ So a contract to perform certain services, to be paid for by conveying or leasing to the contractor a piece of land, is not wholly void within the statute. On the services being performed, a conveyance of the land cannot be enforced; but a recovery may be had for the *value* of the services, in determining which the value of the lease, or of the land, cannot be taken into account.⁶ In Indiana, however, it is held that such a contract is not within the statute.⁷ A verbal license to insert beams in the wall of a house is good.⁸

§ 143. A promise to pay the owner of lands a certain sum on his consenting to have a highway laid out across them, is not within the statute, and if the road be laid out and opened, an action can be maintained upon it.⁹ So an agreement by a mortgagee, on the mortgagor releasing the equity of redemption, to sell the mortgaged premises, and after discharging his own debt to pay over the surplus

¹ 3 Day, 476. 1 Com. on Con. 75 to 80. 22 Barb. 336. 35 N. H. 477.

² 8 Wend. 587. 19 Barb. 317.

³ 7 Cowen, 263 and refs. 4 Kent, 450.

⁴ 11 Mass. 533. 7 John. 205. 15 Wend. 380. 1 John. Ch. 131. Lalor, 308. 21 N. Y. 118. 29 id. 634. 5 Barb. 379. 10 id. 333. 20 id. 311. 31 id. 548. 2 Wis. 250.

⁵ 3 Kent Com. 452. 11 Mass. 533. 15 Wend. 380, 392. 10 Barb. 333. 22 id. 336. 26 Mo. 116. 19 Ind. 10.

⁶ 19 N. Y. 299; and see 25 Barb. 433.

⁷ 17 Ind. 124.

⁸ 3 E. D. Smith, 111.

⁹ 10 John. 109. 6 Wend. 461

moneys, is valid; and in such case the mortgagor may immediately after the sale maintain his action for the surplus, notwithstanding the mortgagee sold the premises on credit.¹

§ 144. An agreement to pay for the drawing of a lease, a contract for, or a deed of lands, is not one affecting the freehold. It is therefore governed by the same rules as all other contracts, the form of making which is not prescribed by the statute.

§ 145. Although by the statute of frauds, a verbal lease of real estate for a longer term than one year is void, yet if the lessee enters under it he is liable to the lessor for the rent as a tenant from year to year and the rent agreed upon by it would be the measure of the use of the premises, and the time appointed for paying it the days when it became payable.² Strictly speaking, he is a *tenant at will*; but the law construes tenancies at will for the purpose of notice to quit, to be tenancies from year to year.³

It is held, in Ohio, that if a person takes possession of a lease that is void under this statute, and makes payments of rent, the lease is thereby made valid.⁴

§ 146. By another section of the statute of frauds, no estate or interest in lands other than leases for a term not exceeding one year, nor any trust or power over or concerning lands or in any manner relating thereto, can be created, granted, assigned, surrendered or declared, unless by act or operation of law, or a deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized in writing.⁵ Under similar statutes a verbal agreement between a landlord and his tenant from year to year to determine the tenancy in the middle of a quarter; or one by a joint lessee of a salt well to transfer his interest to his co-lessee, have been declared to be void.⁶ But when, in a three years lease, there is an unexpired term of *less than one year*, that may be surrendered by parol.⁷

§ 147. It is not sufficient under this statute, that an assignor shall affix his signature and seal to the back of a lease and then agree with a third person that another shall thereafter write an assignment of

¹ 10 Wend. 436; also 4 E. D. Smith, 153. 15 id. 405. 5 How. Pr. R. 81. See also 19

² 2 Cow. 660. 8 id. 226. 5 T. R. 471. id. 29. 28 Mis. 400.

24 Wend. 484. 7 Barb. 199. 25 ib. 249. ⁴ 7 Ohio N. S. 157.

17 ib. 154. 31 Ala. 412. 2 E. D. Smith, ⁵ 2 R. S. 134, § 6. 3 id. 220. (Banks' 5th ed).

⁶ 4 Cowen, 350. 7 id. 751. 4 Wend. 327. ⁷ 2 Starkie 379.

⁷ 23 N. Y. R. 363.

the lease to such third person over the signature and seal.¹ The canceling and destroying a lease by agreement of the parties to it, will not operate to divest the estate of the lessee. It is a surrender in writing, which the statute requires.² For a similar reason, title to real estate cannot be restored to a grantor by the surrender and destruction of his deed, although it is done by the agreement of the parties and for the purpose of restoring the title.³ Under such a statute as the one under consideration, a sealed lease may be surrendered by a writing not under seal.⁴

§ 148. A surrender may however be by *operation of law*, as where a lessee takes a new lease of a portion of the same term which he held;⁵ or the lessor, with the consent of the lessee, grants a new lease to a third person, who occupys and pays rent to the landlord; the new lease being one which creates a good estate for the term for which it is given. If otherwise, the acceptance of it by the lessee will not be an implied surrender.⁶ So where the lessee, having determined to quit, hands the key to the lessor, who receives it, declaring himself not dissatisfied, and enters into possession for the purpose of reletting, placing the placard "to let," on the premises, and delivering the key to his agent for the purpose of reletting them, this is a good surrender, by operation of law;⁷ but when the landlord merely receives the key, saying, he receives that, but not the premises, there is no valid surrender;⁸ nor is there one where the premises, by the direction of one who is a surety for the payment of the rent, are relet for his account and benefit, after his principal has failed and abandoned them.⁹

§ 149. Where the lessee had sublet the leased premises; and the lessor, with the lessee's consent, received rent from the sub-tenant, it has been held that the substitution involved a surrender, for it was made with the assent of the lessee, which could not be without his surrender.¹⁰ So, where after the lessee had sub-let the whole of the premises, by two sub-leases, the landlord called on the sub-tenants, produced the sub-leases, demanded rent, forbade the payment of any more rent to the original lessee, said he was the rightful landlord, that he had taken the place off the lessee's hands, and collected rent

¹ 2 John. 430.

² 11 Wend. 616.

³ 6 Hill, 409.

⁴ 16 Ind. 219.

⁵ 15 Wend. 400, &c. See 39 Mo. 115.

⁶ 15 Wend. 400. 4 Bosw. 204. 38 Eng. L.

& E. 469. Sec 19 Barb. 136. 1 Duer. 266.

⁷ 1 E. D. Smith, 147.

⁸ 3 E. D. Smith, 560.

⁹ 4 Bosw. 192.

¹⁰ 2 Barn. & A. 119. 44 Barb. 636. 15 Wend. 400, &c. *Infra*, §§ 336, &c.

of the sub-lessees.¹ But in several of the states, it is held that the mere assignment of a lease by the lessee with the assent of the lessor, and an acceptance of rent from the assignee by the lessor do not amount to a surrender, nor discharge the lessee from liability for rent subsequently accruing.² And so, where a tenant informed his landlord that he should quit the premises, and the latter replied that if he did so, he should let premises on his account and hold him responsible for the rent, and subsequently the landlord sent a person to occupy the house, and the tenant moved out without further remark, it was held that this did not release the lessee.³ But when the tenant agreed to surrender possession to a purchaser of the fee, on payment of a certain sum, this was held to be a valid agreement.⁴ It is held that where a lessee assigns his interest in the unexpired term to another, the latter stands in the relation not of sub-lessee, but of assignee to the landlord, and liable, as such, on all the covenants in the lease between the original parties.⁵

§ 150. By the Revised Statutes "no executor or administrator shall be chargeable upon any special promise to answer damages or to pay debts of the testator or intestate out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, be in writing and signed by such executor or administrator, or by some other person by him thereunto specially authorized."⁶ The promise, like all contracts, must be made upon some valid and sufficient consideration, as assets in his hands, or forbearance to sue; if the promise is in the form of a note, that is sufficient presumptive evidence of assets, but not of forbearance, even if the note is payable at a future time. This presumption may be rebutted as between the parties thereto by proving that there were no assets; if the promise was not, in form, a promissory note, but a simple agreement, expressing no consideration, it would be necessary for the promisee to prove one in order to sustain his action.⁷

§ 151. With the exception of such contracts as are required by statutes, or some positive rule of law, to be in writing, or to have certain conditions in their form observed, every agreement between two persons capable of contracting, made upon sufficient consideration, is valid, whether it be made verbally or otherwise; and an

¹ 1 Sand. 5.

⁴ 4 Mich. 106. *Infra*, § 33 (b.)

² 8 Wis. 141. 42 Penn. 77. See 24 Barb. 525. E. D. Smith, 361.

⁶ 2 R. S. 113, § 1. 3 *id.* (Banks' 5th ed.) 201.

³ 1 Daly, 485. S. C. 29 How. Pr. R. 259.

⁷ 9 Wend. 273. 13 *id.* 557.

⁴ 1 Daly, 259.

action may be brought by the party injured by the failure of the other to keep his part, for the amount which, by its terms, should be paid him, if the contract provides for such amount; and if it does not, for a sum of money sufficient to compensate him for the damage he has sustained. And if the amount claimed do not exceed two hundred dollars the action is cognizable in a justice's court.

§ 152. Every species of these contracts may be established by proving them to have been made by the duly authorized agent of the party; for it is a maxim in law that each one is bound by the acts of his agent as perfectly as if he himself had performed them, while such agent is acting in the scope of his authority;¹ and even, in some instances, when he goes beyond it.

§ 153. An *agent* is one employed by any person competent to do any act for himself, to do it for him. The employer is called the *principal*, and the employment an *agency*.² Any person who is not actually disabled by weakness of mind or want of understanding may be an agent. What would constitute a legal disability to contract for himself will not incapacitate one from becoming an agent. Thus infants, slaves, or married women, may act as agents. In regard to married women, however, it is not clear that they may act as agents against the express dissent of their husbands, as to do so might be inconsistent with their duties to their husbands or families.³ The husband may act as his wife's agent, under the recent acts relative to married women.⁴

§ 154. The authority may be shown by parol evidence,⁵ and may be conferred verbally⁶ (except in one or two special cases), and may be implied from the acts of the parties. Thus, if one knowingly suffers another to do acts in his name, as to sell his goods, to purchase goods for him, or to sign his name to mortgages, notes or checks, he is presumed to have given him an authority to do so, and the acts will bind him.⁷ So, even if the note is given in the assumed agent's own name, it may be a question for the jury to say if in doing it, he did not act as agent and not as principal.⁸ If a person has heretofore

¹ 33 Ill. 508. 44 id. 262.

² Story on Ag. § 3.

³ Story on Ag. § 7. Dunlap's Pal. 2 and note (b). 16 Wis. 235.

⁴ 36 N. Y. 600. 1 Keyes, 29. Id. 53. 3 id. 539. 4 id. 361 and refs.; also 37 Ill. 197. 18 Wis. 35. 26 Iowa, 297.

⁵ 16 Iowa, 62.

⁶ 18 Barb. 60. 33 id. 323. 2 Wallace, U. S. 177.

⁷ Story on Ag. §§ 93, 94, 228. 5 Seld. 40. 26 N. Y. 505. 30 id. 83. 17 Barb. 171. 18 id. 500. 24 id. 20. 32 id. 17. 41 id. 575. 14 Wis. 553. 18 Ill. 294. 7 Ind. 356. 9 id. 217.

⁸ 5 Seld. 205. 42 Mo. 74. See 24 Iowa, 387. 2 Nevada, 214.

allowed another to act for him, or to transact certain business for him, or has afterward ratified his acts, and he continues to do the *same kind of business or transactions*, it will be presumed that his agency continues, and proof of the prior transactions is competent on the question of agency in the subsequent one.¹ If an agent or servant performs an act such as was for the manifest benefit of his principal or master that it should be performed, the assent and authority of the principal or master will be implied.² Several instances of a special agency or employment do not prove a general one.³ But while it is necessary to prove the principal's knowledge of, or subsequent assent to the acts constituting the agency, it is not necessary that the person dealing with the agent should have knowledge thereof at that time.⁴

We have spoken of special cases where verbal authority is insufficient; they are those where it is required by statute that it be in writing, as in certain instances in the statute of frauds, or where the authority is to execute a conveyance, or to do any act which is required to be by deed, in which case the authority of the attorney or agent must be conferred by deed; but if the writing or act would be effectual without a seal, the addition of a seal will not render an authority under seal necessary; and if executed under a parol authority, or subsequently ratified or adopted by parol, the instrument or act will be valid and binding on the principal.⁵

A purchaser from an unauthorized agent cannot sustain his purchase on the ground of apparent authority, except on proof of good faith and the payment of a proper consideration.⁶

The doctrine of implied agency, where it arises out of the negligence of the principal, is based upon the principle of *estoppel in pais*.⁷

§ 155. Where an authority is confided to several persons for a private purpose, without giving them power to act separately, or giving a majority the power to act, they must all concur or their acts will be void.⁸ But it is otherwise in matters of a public concern, where power for public purposes is delegated to a certain number;⁹ in such

¹ 4 Kern. 439. 16 N. Y. 325. 14 Barb. 358. 15 id. 323. 40 id. 292. 41 id. 575. 44 Ill. 114. 20 Iowa, 354. 4 Nevada, 78. 12 Minn. 255.

² 1 Bosw. 321.

³ 9 Iowa, 487.

⁴ 17 Ill. 272. See 3 Hill, 72.

⁵ Dunlap's Paley, 157, &c. 1 Seld. 229. 5 Dutch. 74. 40 Mo. 69.

⁶ 1 Black, U. S. 192.

⁷ 34 N. Y. 30.

⁸ 6 John. 39. 22 Barb. 137. 23 id. 306. 5 Minn. 463. 10 Wis. 271. 1 id. 597. 25 Iowa, 115.

⁹ 1 Wis. 597, and 10 Ohio, N. S. 257.

cases in New York, by statute, a majority can act on a meeting of all the persons to whom the power is delegated, unless a different provision is made by statute.¹ At common law the rule is that where the act is a ministerial one, a majority must concur and unite in the performance of the act, but they may act separately; if the act is a judicial one, that is, requiring the exercise of discretion and judgment, the persons to whom the authority is delegated must meet and confer together, and be present when the act is performed; or at least a majority must meet, confer and be present after all have been notified to attend;² and it will be presumed, in the absence of evidence to the contrary, that all were present and took part in the proceedings.³ In several instances, statutes have changed the common law rule.⁴

§ 156. A *special agency* is an agency to do a single act, or certain specific acts only, as to sell my horse with or without a warranty, or to purchase a horse for me; and it must be strictly pursued.⁵ But if the principal, by his declaration or conduct, has authorized the opinion that he has given more extensive powers to his special agent than were in fact given, he is liable accordingly.⁶ On the other hand, if there is no such declaration or conduct, one who deals with a special agent is bound to acquaint himself with the actual extent of his authority.⁷ This indeed is the case in any agency.⁸ One case holds that where a special agent does what his authority permits; and more, the excess only is not binding on the principal.⁹

§ 157. A *general agency* is an authority either to transact all manner of business for another, which is rare, or, as is more common, to do for another all acts connected with a particular business or transaction. The principal is bound by all the acts of his general agent which are ostensibly within the scope of his authority, notwithstanding they may be in violation of his private instructions.¹⁰ It is hardly necessary to add, that if the person dealing with an agent knows that he is violating his instructions, or that his powers are limited, or

¹ 2 R. S. 555, § 27. 3 id. (Banks' 5th ed.) 869, § 29. 24 Barb. 371. 9 Iowa, 549. 13 id. 214. 12 Ind. 306. 22 id. 36. 19 Ill. 456.

² 22 Barb. 140, 400. 23 id. 176, 304. 28 id. 310. 31 id. 312. 10 Wis. 271. ³ 34 Ill. 68. 18 Iowa, 499. 12 Minn. 255.

⁴ 22 Barb. 400. 31 id. 312.

⁵ 36 N. Y. 441. 2 Keyes, 499.

⁶ 4 Seld. 398. 4 Kern. 418. 41 Barb. 446. 7 Ind. 356. 12 id. 308.

⁷ 2 Kent, 620. 1 Peters, 290. 4 Cowen, 645. ⁸ 16 Iowa, 74. ⁹ Dunlap's Paley, 199, &c. and notes. ¹⁰ Story on Ag. §§ 126, &c. 1 Salk. 96. 3 Kern. 600. 20 Barb. 493. 26 id. 564. 32 id. 11. 34 id. 607. 20 Ill. 650. 17 Iowa, 276. 20 id. 354. 1 Oregon, 115.

¹ 2 Story on Ag. §§ 126, &c. 4 Seld. 398.

has reason to suppose they are, or at least has such notice as to put him on inquiry, he must run the risk of the principal's disavowing the act of the agent.¹

§ 158. Wherever an authority, express or implied, is conferred upon a general or a special agent, it is construed to include all the necessary or usual modes of so executing it as to accomplish the object of the agency;² as, where I authorize a person to sell my horse, or my slave, his representations or warranty at the time of the sale as to his soundness will bind me;³ or when an agent is employed to sell negotiable paper, he may represent it as a business note and valid;⁴ an agent to sell goods may receive payment for what he sells, and make any deductions, in receiving payment, from the amount for which they were sold;⁵ an authority to deliver freight includes the authority to make terms in regard to the delivery;⁶ an authority to sell lands, authorizes the agent to contract to convey;⁷ and one to purchase goods on credit, authorizes the necessary representation as to the solvency of the principal.⁸ But in regard to a special agent, while, if there are no restrictions, he may employ the necessary or usual modes of accomplishing his agency; as, for instance, may warrant,⁹ (but not when the property is such as is usually sold without warranty); yet, if he is restricted in any respect, as, if he is forbidden to warrant, his warranty, or other act of disobedience, will not bind his principal.¹⁰

Among those cases where it has been held that the agent has exceeded his authority these may be noticed: The power of an agent to insure his principal's property does not authorize him to insure in a mutual company which would make his principal an insurer of others;¹¹ an agent to receive applications for insurance, has no authority to bind the company by representations as to its capital, &c.; nor one to lease or sell real estate, the power to make representations in regard to the title;¹² an agent to collect certain debts can only receive money; a merchant's clerk cannot purchase goods abroad on the credit of his principal; one having specific authority to buy on account of his principal, cannot borrow money for that purpose on the credit of his principal; an authority to buy property will not authorize the agent

¹ 3 Hill, 262, 279. 5 Mass. 26, 27. 2 Head, 116.

² Dunlap's Paley, 200 to 202, note A, and 209. 13 Wend. 518. 21 id. 279. 19 N. Y. 170.

³ 6 Hill, 336. 7 Barb. 53. 34 id. 607.

⁴ 35 Barb. 427

⁵ 6 Bosw. 344. 2 Duer, 302.

⁶ 20 Ill. 375.

⁷ 3 Minn. 225.

⁸ 20 Barb. 494.

⁹ 36 N. Y. 79.

¹⁰ 7 Barb. 53.

¹¹ 26 N. Y. 117.

¹² 3 Wis. 254. 5 id. 279.

to sell or exchange it; the one employed to drive cattle from one place to another, has no power to sell any of them because they become foot sore and unable to travel; an authority to sell for cash does not authorize taking a check payable the next day, though that be a customary way of making cash sales at that place; nor does an authority to sell, give power to pledge for the agent's own debts; nor one to look up property lost by a carrier, authorize the agent to settle the damages with the carrier;¹ authority to collect a bond, is not an authority to take notes or property in payment;² one to sell property will not authorize its exchange for other property; and a general agent cannot, without special authority, consent to an arbitration of his principal's matters.³ An agent sent to get goods, for which his principals would settle when they saw the vendor, cannot fix the price of the goods with the vendor;⁴ an agent to loan money is not authorized to make collections;⁵ nor can one, employed generally to transact business for a principal, sign the principal's name to negotiable paper.⁶

§ 159. The representations, admissions and concealments of an agent, *made at the time*, and constituting a part of the transaction, and being inducements to the contract, are binding upon the principal, though, if made at another time, and without forming part of the transaction, they are not.⁷ The same rule applies to notices to an agent.⁸ And before the acts or admissions of an agent can be given in evidence, the fact of his agency must be prove *abundante*. His own declarations to that effect are insufficient.⁹

§ 160. An agent, ordinarily, and in the absence of express authority, or a fair presumption of one growing out of the particular transaction, or the usage of trade, cannot delegate his authority to another; for it is a maxim of law that the delegated power cannot be transferred by the delegate.¹⁰ But this rule does not extend so far but that an agent may authorize another to perform a mere ministerial or

¹ 3 Keyes, 461. 10 Ind. 8. 12 id. 306.
18 Ill. 96. 7 Wis. 620. Dunlap's Paley,
27 n. a. 212, 213. 15 Iowa, 591. 14 id.
326. See, also, for similar cases of an ex-
cess of authority, 8 Minn. 248. 31 Ill. 200
45 id. 193. 23 Ind. 198. 17 Wis. 477. 32
id. 403.

² 23 Ill. 470. 14 Cal. 396.

³ 10 Mich. 357. 29 Ill. 433.

⁴ 38 N. Y. 463.

⁵ 34 Ill. 68.

⁶ 20 Iowa, 354.

⁷ Story on Ag. § 135. Dunlap's Pal.
267. 13 Wend. 518. 23 id. 260. 19 Barb.
310. 5 Duer, 393. *Infra*, § 1403. 25 Ind.
185. 38 Mo. 168.

⁸ 31 Cal. 692.

⁹ 1 Wis. 23. 19 Ill. 456. 8 Iowa, 122.
11 Mich. 185. 5 Minn. 339. 6 id. 484. 11
id. 39. 12 id. 255. 20 Wis. 520.

¹⁰ Dunlap's Paley, 175. 2 Kent. 633. 1
Keyes, 347. 29 Texas, 150.

mechanical act by his direction, and involving no discretion, as to sign certain acceptances, or to write a letter at the dictation of the agent who is temporarily disabled.¹

An agent must transact the business intrusted to him in the name of his principal.² But in regard to the *form* in which this shall be done, there is a well defined distinction between cases where the execution of the authority is required to be under seal, and those where it is not, or may be not under seal, but by parol only. In the former case the agreement must be executed in the name of the principal, and it must purport to be his deed and not that of the agent. Though in the body of it, it is the principal's agreement, yet if it be signed by the agent in his own name, the principal is not responsible.³ But in the case of agreements which need not be, or are not under seal, but are either verbal or in writing, the rule is a different one; and in such cases, if it appear either in the body of the instrument, or by the signature of the person executing it, or from his acts or conversation, if the agreement was verbal, that he was acting for another, whom, and not himself, he intended to bind, and for whom he was in reality so acting, then he is not personally responsible. If, on the other hand, the agreement was in his own name, and there was nothing to indicate that he made it for another, or that it was intended to be anything other than a personal obligation, then he is bound personally;⁴ and if the agreement is in writing, proof cannot be given to show to the contrary.⁵ While there is some conflict in the cases, and the above distinctions have not always been strictly observed, it is believed that the rules above laid down, will cover and dispose of the various questions which can arise under this branch of our subject. It may be added that if the body of a sealed instrument purports to make it one by the principal, but it is signed by the agent in his own name merely, and is not in any way executed in the name of the principal, neither principal nor agent is bound thereby.⁶

§ 161. A *factor* is an agent or broker employed to sell goods or

¹ Dunlap's Paley, 175, n. a. 1 Hill, 501. 30 id. 218, 223. 40 id. 119. 136 id. 179. 1 Keyes, 347. 22 Barb. 400. 1 Daly, 538. 41 id. 586. 4 Greene, 428. 5 Cal. 487. 7 8 Ohio, N. S. 270. See 18 Ill. 445. 8 Md. id. 535. 24 Mis. 524. 27 id. 162. 31 id. 193. Id. 224. 1 Iowa, 426. 10, Ohio N. S. 444. 1 Minn. 404. 5 id. 463. See 5 Seld. 171. 17 Ind. 495.

² Infra, § 170. Dunlap's Paley, 180. 1 Oregon, 272. 6 Minn. 484.

³ 4 Hill, 351. 4 Barb. 274. 22 id. 239. 5 29 Barb. 193. 4 Duer, 29; but see 5 1 Duer, 96. 4 id. 29. 25 Mis. 313. Seld. 205. 40 Barb. 136.

⁴ 4 Hill, 351. 1 Kern. 200. 3 id. 309. 6 22 Barb. 243 and refs. 35 id. 200. See 21 N. Y. 179. 4 Barb. 274. 23 id. 176. 45 Ill. 79.

negotiate bills upon commission for his principal, having the possession of them for that purpose.¹ His general duty is to pursue strictly the directions of his principal,² unless absolute necessity, or in some instances a pressing emergency requires him to deviate from them, as where the goods are perishable; in which cases although there are some authorities which seem to hold otherwise, it seems to be settled that a deviation will be allowed. So rigid is the rule that a factor is not allowed against orders to sell at the current price, to hold on to goods because the market is dull, even if he has a lien upon them for advances.³ And so, although he has such a lien, he cannot disobey instructions not to sell, or not to sell below a certain price, unless the principal, after reasonable notice to pay the advances, fails to do so.⁴ In the absence of instructions the factor is protected, if he acts according to the best of his judgment and in good faith, and exercises reasonable care and prudence.⁵ As a general rule the factor cannot delegate his powers to another⁶; though in one case a supercargo in a foreign port, who was in ill health, was allowed to delegate his power to another to prevent the failure of the objects of the voyage.⁷

§ 162. A factor at common law has no power to pledge or otherwise dispose of the goods of his principal to secure or satisfy his own debt; and if he makes such disposition of them, the title remains in the principal, and he may reclaim the goods of the pledgee although he was not aware that they did not belong to the factor. And in such cases the principal is not bound to tender to the pledgee any balance which he may owe the factor.⁸ He may also maintain an action against the factor for taking the goods.⁹ If, however, the factor have a lien upon the goods for his commissions or advances, they may be pledged by him for the amount of such lien, with notice of it to the principal,¹⁰ and then he must discharge the lien before he can reclaim the goods, provided the pledgee is under the authority of the factor, and the possession of the pledge is for the purpose of securing and carrying out the object of the original consignment.¹¹

¹ Dunlap's Paley, 13.

⁶ Sel. Notes for Dec. 1853, p. 14. 13

² 1 John. Cas. 437. n. Com. on Con. 236. 21 N. Y. R. 386. 31 id. 676. 22 Miss. 177.

Iowa, 532. 1 Story on Con. § 363.

³ 3 John. Ch. 167.

⁸ 6 Cowen, 128. 3 Seld. 186.

⁹ Com. on Con. 237. Dunlap's Paley, 213. 2 Bosw. 427 and refs. 1 E. D. Smith, 24, 25 and refs.

⁴ 3 Comstock, 62. Id. 78. See 28 N. Y. 67.

¹⁰ 14 John. 128. 5 T. R. 604.

⁵ 1 Story on Con. § 359. 3 Caines, 226. 21 N. Y. 386.

¹¹ 7 East. 7. 4 John. 103. 19 Wend. 431.

2 Bosw. 467. 1 E. D. Smith, 24.

These rules, it is said, apply to technical factors only, and not to others.¹

[§ 162*a*.] But the rigid rule of the common law has been modified in England, and in several of the states of the Union, by what is known as the factors acts; that of New York (Laws of 1830, p. 203, ch. 179, and subsequent statutes) provides, generally, that factors having property intrusted to them for sale, or having the bill of lading, custom-house receipt or ware-house keeper's receipt therefor, are deemed the owners thereof, so far as to give validity to their sale or disposal thereof, for money advanced, or negotiable instruments or other written obligations given upon the faith thereof; but those who take the property as security for the factor's antecedent debt acquire no greater right than he possessed;² nor are those protected who had notice that the factor was not the true owner of the property.³ If the bill of lading shows that the goods did not belong to the factor, and that he has the right to hold them only, his sale will pass no title;⁴ but the mere fact that the invoice shows that the goods belonged to the shipper, is not such a notice of the want of title as will avoid a lien for advances.⁵

§ 163. Neither the goods of the principal, nor the notes, bills or securities taken by the factor upon their sale, are subject to his debts, but they remain the property of the principal. It is otherwise, however, with money which he has received for the goods.⁶

§ 164. Where a factor sells the goods of his principal without disclosing his agency, and takes the note of the purchaser payable to himself or bearer at a future day, and before maturity transfers the note to the principal, payment by the purchaser to the factor after the transfer and before the note falls due, is no bar to the recovery by the principal as endorsee against the maker of the note. But had there been an existing demand due from the factor to the purchaser at the time of the transfer of the note, such demand might have been set-off in an action brought by the principal; and in an action by the principal to recover for goods sold by his factor without disclosing his agency, the purchaser may set-off any demand he may have against the factor.⁷

¹ 5 Cal. 404. 6 id. 383. 11 id. 393.

² 24 N. Y. 521.

³ Laws of 1830, p. 203, § 4. 3 R. S. (Banks' 5th ed.) 76.

⁴ 1 Com. on Con. 237, &c. Willes R. 400.

⁵ 3 Denio, 472. 2 Seld. 374. 2 Bosw. 401.

⁶ 10 Wend. 492. See S. P. 24, id. 458. 7 Bosw. 339.

⁷ 4 Bosw. 155.

§ 165. The general rule is, that a factor must sell the goods of his principal for cash. But where it is the general usage of the trade to sell upon credit, an authority to sell upon the customary credit will be inferred as between the principal and factor.¹ And in such a case the factor must use *ordinary* diligence to ascertain the solvency of the purchaser, and not sell on unreasonable time. This degree of diligence is such as a prudent man should exercise in conducting his own affairs.²

§ 166. Where the usage of the trade is not to give credit, the factor cannot sell on credit without an express authority. Thus a stock broker cannot sell upon credit, for that is not the usual course of his business.³ Nor can the agents of a state sell its stock on credit, even if usage allowed that of private individuals to be so disposed of.⁴

§ 167. Payment to a factor or agent at the time of the sale is valid, unless the vendee has been forbidden by the principal to pay the factor or agent;⁵ and the factor has the right to pay over the proceeds to his principal although he may know that the principal has promised them to his creditors.⁶ If a factor, without disclosing his agency, sells his principal's goods, taking a negotiable note therefor, and then transfers it to his principal before its maturity, and the principal afterward sues it, the defendant cannot prove, in defense to any part of the amount, a payment made by him to the factor *after* he had transferred the note.⁷

§ 168. There are some rules recognized in relation to factors which do not apply to ordinary agents. The factor may sell his principal's goods in his own name; he may bring an action for the price of the goods, and if he has a lien upon the price for his compensation it will not be prejudiced by any set-off which the purchaser may have against his principal; and he may bring an action in his own name for injuries to the goods, or to obtain their possession from one who has wrongfully taken or detained them. The reason for these rules is, that the factor has an interest in the goods for his commissions and advances; and in all cases where an agent has an interest in the goods, coupled with his agency, the same rules will apply to him.⁸

§ 169. An agent acting within the scope of his authority and

¹ Dunlap's Paley, 26, &c.; 212, &c. 8 Paige, 527. 2 Kent, 622. 1 Story on Con. § 354. ⁵ 8 Paige, 527. 6 Bosw. 344 and refs.

² Story on Bail. §§ 455, &c. 1 Com. on Con. § 236. 3 John. 319. 6 id. 69. ⁶ 27 Mis. 179. ⁷ 10 Wend. 492.

³ 1 Camp. 258. 2 Kent, 622. 2 Dunlap's Paley, 212. ⁸ Story on Con. § 352. 18 John. 24. 24 Wend. 169. 5 Sand. 267. 7 Mass. 319.

disclosing the name of his principal at the time of making the contract, or the fact of his agency being known, is not liable; and in this case there is no difference between an agent of the government, or of a private person.¹ So, where money has been paid by mistake to an agent, and before notice of the mistake, he pays it over to his principal, the principal, and not the agent, is liable for it; but if he had notice of the mistake it would be otherwise; and if the money is not paid over the agent is liable for it.² If the agent, however, has obtained property *wrongfully*, he cannot defend an action by the injured party, on the ground of payment over of the money to his principal.³ What is a payment is sometimes a question of doubt. If the agent has merely credited the money in his account with his principal it is no payment;⁴ but if he has credited it, and the accounts have been subsequently so settled, it is a payment to the principal;⁵ a government agent was held not liable for money received by him *erroneously*, when it appeared that it had been paid over by him to his superior.⁶ But if he had compelled the payment he would have been liable.⁷ An agent of the government, known to be acting as such, and not making himself liable by anything amounting to a personal contract, is not answerable for costs, nor for articles furnished by his order, even though the terms of the contract be such as might, in a case of a private nature, involve him in a personal obligation.⁸ Such agents can never go beyond their authority, of the extent of which all persons must take notice.⁹ If one acts as agent, an action cannot be maintained against him for want of authority without proving that he had no authority; the onus being on the plaintiff.¹⁰

§ 170. Agents become personally liable, on contracts made by them, in the following cases: 1. Where the principal is not known; as where a factor or servant purchase goods, or enters into contracts generally, without disclosing the fact that he does it for his principal,¹¹ or contracts for an undisclosed principal.¹² 2. When there is no

¹ 7 John. 179. 1 Wend. 173. 3 Hill, 137. ⁸ Dunlap's Paley, 376, &c. 2 Kent, 632. 1 Sand. 209. 29 Ill. 313. 36 id. 82. 29 1 T. R. 172. 22 Barb. 611. 4 Minn. 126. Cal. 568.

² 17 Mich. 500.

³ 7 Wis. 595.

⁴ 3 Sand. 213 and refs.

⁵ 1 Wend. 173.

⁶ 4 T. R. 553.

⁷ 9 John. 201.

21 id. 97.

⁹ 10 Wis. 518.

¹⁰ 19 Barb. 74.

¹¹ 18 Wend. 425. 9 Barb. 528, 532. 45 id. 470. 6 Ind. 426. 4 Greene, Iowa, 428. 42 Ill. 239.

¹² 28 N. Y. 269.

responsible principal (except in the case of public agents); as where A contracts with B to pave the streets in Putney, and B agrees on behalf of the parish to pay him. The parish not being a body that could be sued, B is liable on the contract.¹ 3. Where the agent contracts in his own name without stating that he acts as agent;² or, the fact of his agency being known, the person with whom he is dealing prefers to, and does take his personal obligation, rather than that of his principal;³ or, while nominally contracting as agent, he really contracts in his own name, the designation in the body of the contract, or the addition to his signature to a note, or other writing, of the word "agent," or other similar designation, being a mere *descriptio personarum*.⁴ 4. Where he exceeds his authority,⁵ or acts without authority (his liability in such a case resting upon the ground that he warrants his authority, and not that the contract is to be deemed his own);⁶ there may be instances where neither the principal or agent are liable on the contract itself; and the agent, when liable, is made so on this ground of a breach of his warranty of authority.⁷ Where the agent exceeds his authority, the party with whom he contracts may hold him responsible for the whole contract, and need not resort to the principal for so much of it as the agent had authority to make.⁸ But, it is held in some of the states, that if one acts as agent without any authority, he is not personally bound unless his agreement contains language by which he binds himself.⁹

§ 171. An auctioneer has such an interest in the goods he is selling, that he may maintain an action in his own name for the price of the goods sold;¹⁰ but the purchaser may set off against it a debt due to him from the principal.¹¹ He is personally responsible for the deposit money where a good title cannot be made to the purchaser, and in damages if he has not disclosed the name of the principal.

§ 172. Where warranted by the usual course of business, payment to an agent while his authority continues, and without a prohibition

¹ 2 Kent, 630. Dunlap's Paley, 371, 374.

⁵ 2 Kent, 630. 33 N. Y. 610. 24 Mis.

² 2 Kent, 630. 21 Barb. 17. 29 id. 193.

524. 20 id. 284.

3 Duer, 366. 4 id. 29. 27 Mis. 162. 4

⁶ 26 N. Y. 117. 28 Barb. 644. 31 id.

Greene, Iowa, 428. 9 Ind. 289. 35 Ill. 82.

196. 35 id. 200. 16 Iowa, 163. 21 Wis. 197.

29 Cal. 568. See 21 Wis. 197.

⁷ See 28 N. Y. 269. 22 Barb. 239. 35

³ 18 Barb. 143. 39 id. 565 and refs. 24

id. 200. See 38 Mo. 245.

Iowa, 419. 2 Nevada, 214. 17 Ohio, N. S.

⁸ 11 Wend. 477.

215.

⁹ 32 Ill. 532. 7 Blackf. 41.

⁴ 5 Seld. 571. 35 Barb. 200. 10 Ohio,

¹⁰ 1 H. Bl. 81. 16 John. 1.

N. S. 444. 5 Minn. 463. 9 Ind. 224. 17

¹¹ 7 Taunt. 243.

id. 495. Ante, § 160. 2 Nevada, 214. 13

Minn. 106. 17 Ohio, N. S. 125. Id. 215.

by the principal, is good, and operates to discharge the liability although the agent does not pay over the money to the principal.¹ Simply placing the amount to the agent's credit is not a payment;² and, generally, the agent, in the absence of express authority, or some usage, can only receive money in payment.³ Where there is a note or other written security the debtor must see that the agent has it in his possession, or is authorized to receive the money, or the payment will not bind the principal.⁴

§ 173. The authority of an agent may terminate by the death of the principal,⁵ the completion of the business he was to perform,⁶ the limitation of time for which he was appointed,⁷ a change in the state or condition of the principal, such as the dissolution of a partnership,⁸ or a revocation of the agency.⁹ In this last case, the authority continues until notice of the revocation, and this notice may be given by the agent or the principal.¹⁰ The authority of an agent to draw the moneys of a firm from bank, and apply them to the uses of the firm, continues, in a qualified form, after the death of one of the partners.¹¹ A power of attorney to confess judgment is not revocable by the party who gives it.¹² An assignment of a judgment revokes the authority of the plaintiff's attorney to collect it.¹³ A joint authority to two or more, terminates by the death of one.¹⁴ A power of attorney, constituting a part of a security for money, and necessary to give effect to it, or where given for a valuable consideration, is not revocable.¹⁵ If the principal be an unmarried woman, at common law her marriage would determine the authority of her agent;¹⁶ but under the provisions of the statutes for the protection of the rights of married women, the reason of the rule seems to have ceased, and it is not certain that the agency would not continue.

§ 174. From the foregoing propositions it is clear, that if my servant has authority to buy and sell goods for me, he is my general agent for that purpose, and his contracts in my name will bind me:

¹ 11 East. 38. 19 Barb. 9. 34 id. 612.
6 Bosw. 344. 3 E. D. Smith, 71. 3 Ind.
407. 45 Ill. 79.

² 3 E. D. Smith, 71.

³ 12 Cal. 139. 13 Iowa, 256.

⁴ 1 Salk. 157. 13 East, 432. 18 Iowa,
499. 45 Ill. 460. 46 id. 242.

⁵ 2 Kent, 643. 7 Barb. 412. 34 id. 539.
5 Sand. 376. 3 Brad. 277. 26 Mis. 311.
15 Cal. 12. 28 id. 645. 13 Ohio, N. S.
574. 17 Iowa, 73.

⁶ 2 Kent 643. 23 Ind. 199.

⁷ 2 Kent, 643.

⁸ 2 Kent, 643. 36 Barb. 324.

⁹ 19 N. Y. 9. 14 Iowa, 326.

¹⁰ 4 E. D. Smith, 165.

¹¹ 32 N. Y. 553.

¹² 15 Ind. 248.

¹³ 27 Ill. 149.

¹⁴ 2 Kent, 645.

¹⁵ 17 Ill. 531. 8 Cal. 522. 32 id. 609. 2
Kent, 643.

¹⁶ 2 Kent, 645. Dunlap's Paley, 189 and
notes.

and if am accustomed to let him purchase upon credit, I am answerable, though in the particular instance he buy without my orders, or even contrary to them. So, if I give him money to make a purchase, and he converts it to his own use and purchases the article on credit, where I have permitted him to deal on credit; and where I send him to you once to deal on credit, I am liable if he deal with you a second time against my orders, unless I have given you notice.¹

§ 175. A master is also liable for goods or services procured by his servant, which come to his use and benefit with his assent; as where the servant, not being supplied with money, purchases on credit hay for his horses, or food for his table, and this even if he knew nothing of the contract, and it was the only one the servant ever made. But when I forbid you to trust my servant and you violate the direction, it is at your peril, and I am not liable.²

§ 176. In all these cases it must appear that the master had either expressly or by implication delegated an authority to the servant, in order to render him liable.

[§ 176a.] Although, at the time of performing an act as agent, there was no authority to so act, yet the assumed principal may afterward ratify it, *as an entirety* and as it stands; and, when this is done, such adoptive authority relates back to the time of the original transaction, and is deemed in law to be the same for all purposes as if it had been given before.³ Such subsequent ratification may be express or implied, as by acquiescence⁴ (the acts of the principal being liberally construed in favor of the ratification⁵); but it must be with full knowledge of all the circumstances of the case, or the means of acquiring such knowledge;⁶ and, when it takes place, releases the agent from all liability to his principal for his unauthorized act;⁷ though it does not discharge him from his obligation to others.⁸ Among other evidences of ratification are the payment, by the principal, of moneys due on the agreement made in his name, by the unauthorized

¹ 1 Strange, 506. Hoff. 364.

⁵ 1 Caines, 526. See 15 N. Y. 579.

² 1 Com. on Con. 218 to 225.

⁶ Dunlap's Paley, 172 and notes. 4 Seld.

³ 5 Hill, 107, 113. 15 N. Y. 577. 31 id. 611. 36 id. 83. 3 Keyes, 107. 11 Barb. 655. 12 id. 53. 7 Ind. 547. 27 Mis. 163. 20 Ill. 191, 629. 35 id. 41. Id. 544. 1 Oregon, 115. 16 Iowa, 74. 20 id. 354.

398. 6 id. 213. 3 Kern. 587. 33 N. Y. 648. 34 id. 475. 36 id. 63. 40 Barb. 648. 7 Cal. 171. 10 id. 354. 23 Ill. 470. 5 Minn. 339. 12 id. 255. 13 Iowa, 214. 14 Wis. 553. 35 Ill. 41. 41 id. 323. 44 id. 325. 4 Nevada, 78.

⁴ Dunlap's Paley, 171, notes. 19 N. Y. 218. 27 id. 546. 33 Barb. 323. 40 id. 648. 7 Mich. 355. 13 Iowa, 455. 26 Id. 297. 23 Ill. 623. 16 Wis. 120. Id. 629.

⁷ Dunlap's Paley, 171, note o and refs.

⁸ 8 Wend. 494. 1 Denio, 471.

agent,¹ or availing himself of a judgment or other act procured or performed by him;² one case, however, holding that the mere receipt of a portion of the money, realized from property improperly sold by a sheriff, will not be construed as a ratification of the sale.³

Although the subsequent ratification relates back to the time when the act was done, it cannot be allowed to do so to the prejudice of the rights of others,⁴ nor does a disapproval of the act prevent a subsequent ratification.⁵ A letter authorizing certain acts, received subsequent to their performance, is a ratification of them.⁶ The unauthorized acts of one who is actually an agent must be repudiated in a reasonable time after the principal learns of them, or they will be considered as ratified by implication, while those of a stranger require stronger evidence of their ratification;⁷ but one case holds that the mere knowledge by a principal that his agent has, against his authority, appointed a sub-agent, does not ratify the appointment;⁸ when the agent acts only for himself, and does not pretend or assume to be acting for another, a mere subsequent ratification will not bind one as a principal;⁹ and where there has been a ratification, the principal cannot afterward avoid it.¹⁰

[§ 176*b*.] An agent, by the consent of his principal, may himself buy the principal's property, or sell his own to him, or otherwise transact business where his interest may be adverse to that of his principal.¹¹ But in the absence of such consent or an understanding equivalent thereto, an agent cannot act for his own benefit, or have an interest adverse to his principal's in relation to the subject matter of his agency; nor can he be the agent for both parties in any transaction.¹² If he violates this rule, the contract is void in law at the principal's election, irrespective of any question of actual fraud.¹³ Thus, one who is employed to purchase for another, cannot sell his

¹ 30 Barb. 224.

² 6 Seld. 335. 31 N. Y. 611. 32 Barb. 9. 37 id. 251. 2 Duer, 26. 6 id. 328. 2 Bosw. 570. 5 id. 326. 6 id. 181. 5 Minn. 339. 16 Ind. 481. 1 Clarke, Iowa, 242. 7 Mich. 355. 6 Wis. 175. 11 id. 180. 16 Ill. 397. 26 id. 189.

³ 28 Ill. 135. See 16 Wis. 120. 35 Ill. 41. 36 id. 321.

⁴ 41 Maine, 441. 14 Cal. 396. 19 Iowa, 480. See 35 Ill. 544.

⁵ 28 Vt. 338.

⁶ 42 Maine, 157.

⁷ 1 Black. U. S. 533. 26 Ill. 447. 10

Bosw. 337. 23 Ind. 99. 22 Iowa, 508. 16 Wis. 120. 21 id. 151.

⁸ 13 Iowa, 532.

⁹ 36 Barb. 655.

¹⁰ 11 Iowa, 233. 18 id. 256.

¹¹ 4 Seld. 216. 34 Barb. 276.

¹² Dunlap's Paley, 33, &c. and refs. 4 Kern. 85. 17 Barb. 132. 30 id. 553. 32 id. 9. 36 id. 270. 52 id. 173. Id. 217. 24 How. Pr. R. 15. 8 Mich. 433. 22 Ind. 471. 29 Cal. 142. 32 Ill. 429. 34 id. 172. 18 Iowa, 238.

¹³ 4 How. U. S. 553. 4 Kern. 85. 20 Barb. 468. 34 id. 276, 287. 36 id. 270.

own property to his principal;¹ an attorney cannot act adversely to his client's interest in business intrusted to him;² one employed to sell cannot himself be the purchaser;³ a contract of insurance by an agent who acts for both insurer and insured is void at the election of either;⁴ and so, where an insurance agent insures his own property, the insurance is void at the election of the company.⁵ And so, in all conceivable cases, the agent is prohibited from acting, against their knowledge and consent, for the several parties to an agreement, or for his own interest, or where his interest is or may be contrary to that of his principal, the law not stopping to speculate on the actual result to the principal or either party, but condemning the act from high motives of public policy;⁶ a rule which extends equally to public officers as to private individuals.⁷ So rigid, indeed, is the law against these transactions, it holds that, where an agent has secretly acted for both parties, neither can enforce the agreement against the other;⁸ and the only relaxation allowed is possibly in the case of a *bona fide* assignee of negotiable paper,⁹ or where an agent, in good faith, uses his own money or property in the business of his principal.¹⁰ It has, also, been held that where an agent was employed by one person to find a tenant for a farm, and by another to find a farm which he could hire, and the agent brought the two together, and consummated a bargain between them, that his agency for both constituted no bar to the recovery by him of the price agreed to be paid him by the owner of the farm for finding him a tenant;¹¹ and, also, that the financial officer of a bank, who is a stockholder therein, may buy, for his own benefit, property pledged to it for debt, provided that it is bought for a price sufficient to pay the lien thereon.¹² But these, and such cases as these, do not affect the general principles applicable to such cases, which therefore remain as we have above stated them.

[§ 176c.] An agent who has received property, or transacted any business for or on account of his principal, cannot afterward deny the right of the principal to the property, or claim that it belongs to some other person; nor can he deny the agency itself, or the authority of his principal.¹³

¹ 34 Barb. 276. S. C. 36 N. Y. 427. 2 Transcript, 200.

² 16 N. Y. 285. 34 id. 167.

³ 1 Seld. 256. 4 id. 216, 30 Barb. 553. 32 id. 9. 14 Texas, 217.

⁴ 4 Kern. 85. 20 Barb. 468.

⁵ 41 Barb. 353.

⁶ 2 John. Ch. 260, 261. 1 Seld. 262. 41 Barb. 356, &c. 4 How. U. S. 557. 3 Beav. 84.

⁷ 11 Mich. 222.

⁸ 6 Bosw. 8.

⁹ 25 N. Y. 293.

¹⁰ 5 Bosw. 85. S. C. 28 N. Y. 379.

¹¹ 1 Wis. 151.

¹² 22 N. Y. 520.

¹³ 31 N. Y. 606. 14 How. Pr. R. 461.

3 Wis. 657. 28 Mis. 601.

§ 177. Contracts made by the members of a partnership, within the scope of the partnership business, are binding upon all the members of the firm, as if made by each. And so, one partner is liable to third persons for the negligent acts of his copartner, or for the negligence of a servant, employed and paid by one of them, while such copartner or servant is engaged in the due prosecution of the partnership business.¹ A great variety of questions arise upon these liabilities, which must be determined by the general rules which limit the powers and duties of partners.

§ 178. A *partnership* is formed where two or more persons, competent to contract, unite in any lawful commerce or trade, and imports, in the absence of all contrary stipulations, that its members are to share in its profits and losses. It matters not whether they are publicly known as partners. And if one permits another to use his name and credit as a partner, and hold him out as jointly liable with himself, or if he represents that he is such partner, he will become liable for debts contracted upon the supposed partnership account, as fully as if he were interested in the business.²

§ 179. It is frequently laid down in the books that, to constitute a partnership, there must be an agreement to divide profits and share losses in the business in which the parties are engaged.³ But this rule is not strictly correct. The agreement must be to divide the profits *as profits*. An agreement to share the gross earnings is not sufficient;⁴ and, as to losses, it is sufficient, in order to form a partnership either that the agreement provides for a division of the profits and losses, or for a division of the profits, after the losses are first deducted. In some way there must be a direct or indirect risk of losses to constitute this relation.⁵ Therefore an agreement between two persons, by which both are to share in the profits of an adventure or business, but that one shall not be liable for the loss, is not a partnership.⁶ So, an agency, where the agent is paid out of the profits a certain sum, or a proportion of them, constitutes no partnership.⁷ In such cases,

¹ 18 Wend. 185. 25 N. Y. 595. 1 Bosw. 490.

² Story on Part. §§ 20, &c. Collyer on do. §§ 3, &c. 4 Cowen, 282. 5 Denio, 68. 36 Barb. 64. 40 id. 368. 43 id. 435. 4 Texas, 252. 4 Ohio, N. S. 1. 25 Mis. 341. Id. 348. 43 id. 391. 10 Ind. 475. 12 id. 12. 20 Ill. 396. 21 Iowa, 518.

³ 9 John. 470. 2 Comstock, 418. 27 Ill. 365.

⁴ 5 Denio, 68. 5 Seld. 186. 16 Barb. 309. 7 Ohio, N. S. 172. 40 Ill. 406.

⁵ Story on Part. §§ 20, &c.; 23, 33, &c. 32 Vt. 616. 7 Clarke, Iowa, 435. 17 Wis. 140. 43 Mo. 537.

⁶ 1 Daly, 520. 49 Barb. 606. See also 32 Ill. 411. 4 Nevada, 420.

⁷ Story on Part. § 33. 3 Kent, 33. 20 Wend. 170. 3 Comstock, 172. 25 Barb. 13. 43 id. 435. 24 How. U. S. 536. 32 Ill. 411. 4 Nevada, 420.

however, if the business is conducted under their joint names, the parties would be deemed partners as to third persons, for the reason mentioned in the last section. Whether they are partners, as between themselves, must be determined by their intentions, as legally ascertained.¹ One whose compensation depends upon the profits, is not a necessary party to a suit brought by his principal against a purchaser.²

§ 180. A great variety of cases will readily suggest themselves, where, as between the parties, no partnership exists, and yet where each of them will be liable to third persons as partners. The question of liability in such cases depends upon the ground their acts have furnished to third persons to believe them partners.

§ 181. The essential feature of a partnership being such a community of profits and losses between the partners as above, it matters not how they contribute to the joint business or enterprise. One may give his services and another his capital; one may give capital and services, and another capital or services; or each may give both capital and services;³ each must contribute something. An agreement by which one is not to contribute anything of capital, labor or otherwise, would be void for want of consideration.⁴ Thus, where one agreed to fill a lime-kiln, and another to burn it;⁵ where one agreed to furnish a weaving shop, loom and tackle, and the other to weave; the fact that each was to receive a share of the profits rendered them partners.⁶ The presumption, in the absence of proof, is that the partners share the profits and losses equally.⁷

§ 182. Where stage coaches are run between two places, different proprietors running with their own stages and horses over particular portions of the route, and paying their own expenses, but dividing the fares received from passengers in proportion either to the length of each one's route, or to the distance each should have transported them, all the proprietors were held partners, and liable to a third person for an injury sustained in consequence of the negligence of a driver employed by one.⁸ The distinguishing feature of this case was, that the fare received for passengers formed a common fund, to be divided according to the miles which each run. But where this feature did not exist, or where each proprietor paid the expense of his portion,

31 N. Y. 321. 6 Mich. 300. 15 Ind. 469. 24 Ill. 483. 40 id. 406.

² 49 Barb. 606.

³ 3 Collyer on Part. § 3. 16 John. 34. 5 Denio, 180. 9 Bosw. 310. 27 Ill. 365.

⁴ 4 Nevada, 504

⁵ 5 Wend. 274.

⁶ 2 Watts, 342.

⁷ 23 Cal. 427.

⁸ 18 Wend. 175. See also 1 Bosw. 490.

and received the proportionate share of the fare, it was held that there was no partnership.¹

§ 183. For reasons before given, an agreement by one to work another's farm on shares does not make the parties to it partners, and it makes no difference that the landlord furnishes the stock upon the farm; for the gross product of the farm, and not the profits, are to be divided, and the parties would hold them as tenants in common, and not jointly, until divided.²

§ 184. The partnership may be *general*, as where the parties carry on all their trade or business, or are engaged in one branch of trade or business, only, for their joint benefit and profit; or *special*, in the sense of the common law, as where it is confined to a particular branch or department of business, as contra-distinguished from the general business or employment of the partners, or one of them, or to a particular adventure, as to charter a ship and fit it out for a single trading voyage.³ And where the partnership is so limited, and the partners hold themselves out to the world in their true characters, they are not liable beyond the real scope of their connection.⁴ It is otherwise, however, where they represent and hold out their business connection as more extensive than it really is. The relation continues until dissolved by the agreement of the parties, or by operation of law, as where one sells out to the other, or one of the firm dies.⁵

§ 185. *Dormant* or secret partners are those who participate in the profits of the trade and conceal their names. This concealment need not be a studied one, nor universal. If one is not an active partner, nor generally known as one, he is within this class.⁶ They are equally liable, when discovered, as if their names had appeared, and although they were unknown to be partners when the contract was made or debt contracted; and they may be joined as defendants with their copartners or not, as the plaintiff pleases.⁷ It has been held that they could not or need not be joined as plaintiffs;⁸ but in New York, since the Code, and elsewhere, where there are similar provisions, they must now sue with their copartners.⁹

§ 186. Each partner (except in *limited partnerships*, hereafter mentioned), is answerable for the whole amount of the partnership

¹ 1 Seld. 186. 20 N. Y. 93. See also 19 Barb. 222. 21 id. 26.

² 1 Hill, 234.

³ Story on Part. §§ 74, 75. Coll. on Part. § 6 in note.

⁴ Story on Part. §§ 105, 112.

⁵ 36 Ill. 252. 42 id. 342.

⁶ Coll. on Part. § 4. Story on Part. § 80. 30 N. Y. 374.

⁷ 30 N. Y. 374. 29 Barb. 549. 1 Bosw. 36. 36 Mo. 35. 18 Ill. 37.

⁸ Coll. on Part. §§ 660, 661. Story on Part. §§ 241, 242. 4 Wend. 628.

⁹ Code, §§ 111, 117. 4 Duer, 416.

debts, without reference to the proportion of his interest or the nature of the stipulations between him and his associates.¹ If, however, before the liability of the partnership is fixed, as if, before money in process of collection, is really collected by a firm of attorneys, one of the members retires, and disposes of all his interest in the matter, the retiring partner is not answerable for a subsequent liability incurred by his old partner or a new firm, as for not paying over moneys afterward collected.² If a partner is an infant, his acts are voidable by him; but if, on arriving at full age, he does not disaffirm the partnership and give notice of the disaffirmance to those with whom the firm has dealt, he will be responsible for its debts subsequently contracted.³

§ 187. *Limited partnerships* are partnerships which are formed under a statute whose provisions are borrowed from the civil law. They may consist of one or more *general partners*, who are responsible as other partners are, and of one or more *special partners*, who shall have contributed, in actual cash (payment in goods will not suffice)⁴ a specific sum as capital to the common stock, and who are not liable for the debts of the partnership beyond the fund so contributed. They are formed by filing and recording in the county clerk's office a certificate, signed and acknowledged, or proved before a proper officer, setting forth the name of the firm, the general nature of its business, the names of the general and of the special partners, specifying which are general and which special, with their residence, the amount of capital contributed by each special partner, and the period when the partnership is to commence and terminate. If the business is to be conducted in more than one county, the certificate must be filed and recorded in the county where its principal place of business is to be situated, and a transcript filed and recorded in each other county; and there must be filed with it an affidavit of one of the general partners that the sum to be contributed by the special partner has been actually paid in cash. Until such requirements of the law have been actually complied with, and a notice published in two newspapers, designated by the county clerk, of the terms of the partnership, the persons engaged in the partnership shall all be regarded as general partners, and so they shall be, if there is any false statement in such affidavit or certificate. The special partner is then liable exactly as if no advertisement were published or certificate filed.⁵

¹ 3 Kent, 32. Col. on Part. § 6.

⁴ 39 Barb. 283.

² 15 N. Y. 471. 26 Barb. 83. See 21 Mis. 215.

⁵ 1 R. S. 764, §§ 2, &c. 3 id. (Banks' 5th ed.) 61. 39 Barb. 283.

³ Story on Part. § 7. Col. on Part. § 528.

5 Barn. & A. 147.

§ 188. The business of a limited partnership which cannot extend to banking or making insurance, is required to be conducted under a firm name, in which the names of the general partners only shall be inserted, except that where there are more than two or more general partners, the names of one or more of them may be used with or without the addition of the words "and company," or "& Co.;" but they must put up a sign in a conspicuous place on the outside and in front of their building in which the names of all the partners shall be given in full; if this is not done, no suit shall be abated or dismissed for any defects in the plaintiff's pleadings in stating the names and number of the partnership, but the pleadings may be amended, and if the name of a special partner is used in the firm with his privity, he is deemed a general partner.¹ This provision is probably a peremptory one; not directory merely.²

§ 189. Special partners may examine into the business of the partnership, and advise as to its management; they may also loan and advance money for the partnership and take its notes, drafts, acceptances, and the bonds of, or belonging to the partnership, as their security for its repayment, and use and lend their name for the partnership business; and in these respects shall have the same rights and remedies as any other creditors. They may also negotiate sales, purchases and other business for the partnership, but not to be valid until approved by a general partner, but they cannot transact any other business on account of the partnership without becoming liable as general partners;³ and during the continuance of the partnership term they cannot withdraw the capital they contributed to it. The partnership property cannot, in contemplation of insolvency, be assigned so as to prefer one creditor or class of creditors, and in case of insolvency the special partners cannot as creditors claim any portion of the property until all other debts of the partnership are paid, except for claims allowed to be contracted by the law of 1857.⁴ The interest of the special partner in the partnership effects cannot be levied on and sold by virtue of an execution against him.⁵

§ 190. Actions in relation to the business of a special partnership may be brought by or against the general partners only.⁶ In rela-

¹ Laws of 1866, ch. 661, p. 1424.

² 42 Barb. 482. See 5 Hill, 309. 15 Ab. 454. 24 How. Pr. R. 455.

³ Laws of 1857, ch. 414, § 3, p. 837. 3 Barb. 482.

R. S. (Banks' 5th ed.) 64, § 17.

⁴ 1 R. S. 766, 767, §§ 15, 20, 23. Laws of 1857, ch. 414, p. 837, § 4. 3 R. S. (Banks' 5th ed.) 63, &c. 20 N. Y. 178. 42

⁵ 28 N. Y. 574.

⁶ 1 R. S. 766, § 14. 3 id. as above, p. 63.

tion to the rights of the partners in a special partnership, and their rights as to third persons, the same general rules prevail as in other partnerships, except where there is some express provision of the statute to the contrary.

§ 191. Under the provisions of this statute the courts have held, that where the statute is not substantially complied with in all its requirements, the persons interested in the partnership become liable as general partners for all the debts and engagements of the firm.¹ And where the published notice by mistake stated the capital contributed by the special partner to be five thousand dollars instead of two thousand dollars, which was the true sum mentioned in the certificate, the special partner was made liable as a general partner.² But to misspell the name of one of the members in the publication, as "Argale" instead of "Argall," will not have that effect;³ and so, where the notice as published stated that the partnership was to commence *November* 16th instead of *October* 16th, as in the original papers, it was held, in an action to charge the special partner for a debt created *after* November, that the error in date being unintentional, formed no objection to the notice.⁴

§ 192. Any joint stock company or association, consisting of seven or more shareholders or associates, and any company or association composed of not less than seven persons who are owners of or have an interest in any property, right of action, or demand, jointly or in common, or who may be liable to any action on account of such ownership or interest, in addition to the general rights and liabilities of other partnerships, may sue or be sued in the name of the president or treasurer for the time being, of the partnership or association, with the same effect, so far as the joint property or rights are concerned, as if all the partners or members were made parties to the action;⁵ but no more than one suit shall be brought and maintained against said shareholders at any one time, nor until the same shall have been determined, and execution issued and returned unsatisfied in whole or in part.⁶

[§ 192*a*.] Every association or company formed for the transportation of passengers or property by boats, vessels or stages, is required

¹ 5 Hill, 309. 42 Barb. 482.

² 3 Denio, 435.

³ 24 Wend. 496.

⁴ 5 Hill, 309.

⁵ Laws of 1849, p. 389, ch. 258. 1851, p.

838, ch. 455. 3 R. S. (Banks' 5th ed.) 777, &c.

⁶ Laws of 1853, ch. 153, p. 283. 3 R. S. (Banks' 5th ed.) 777, § 125. 16 N. Y. 113. 21 Barb. 650. 23 id. 33. 4 Duer, 362. 4 Abbott, 130. 11 How. Pr. R. 459.

to make a statement of the names of its members, and file it in the clerk's office of each county in which its business is transacted. If this is not done, an action shall not abate if all the members are not joined as parties.¹

§193. Each partner, and a surviving partner in ordinary cases and in the absence of fraud on the part of the purchaser, has the right to dispose of all the personal property and debts of the partnership, and is considered the authorized agent of the other partners.² He may, without the knowledge of his copartner, who might have been consulted, and even against his protest, assign any or the whole of the partnership effects, in the name of the firm, to any one of its creditors, in payment of his debt (although the effect will be to prefer him to other creditors), or to a third person, in consideration of his promise to pay the debts of the firm, though not yet due.³ So he may assign or mortgage them as security for the antecedent or subsequent indebtedness of the firm;⁴ or one of them may sell all his interest in the firm or its property to his copartner, who, if the transaction is in good faith, will hold it the same as if it had ever been his separate property, free from any lien in favor of partnership creditors, or of his assignor, that it be applied to pay partnership debts; and may transfer it in payment of his own individual liabilities;⁵ if, however, the partnership is insolvent, then a division of its assets among its members and a transfer thereof by the individual partners in payment of their private debts, would be a fraud upon the partnership creditors, and the property remains partnership property till it reaches the hands of a *bona fide* purchaser for a new and valuable consideration.⁶

It has been a mooted question whether under these general powers one partner could, in the absence, or without the knowledge, or against the consent of the other, make a general assignment to a trustee of all the funds and effects of the partnership for the benefit of its creditors; but it is now well settled in New York and some of the other states that he cannot do it.⁷ But the consent of the

¹ Laws of 1836, p. 582, ch. 385. 3 R. S. (Banks' 5th ed.) 778, §§ 128, &c.

² Story, on Part. § 101. Coll. on id. § 384. 3 Kent, 40, 41, 44. 5 Hill, 107. 1 E. D. Smith, 341. 5 Iowa, 224. 8 Mich. 526. 18 Wis. 169.

³ 2 Kern. 442. 24 N. Y. 315. 36 Barb. 622. 4 Cal. 276. 3 Minn. 166.

⁴ 36 Barb. 622. 46 Ill. 25.

⁵ 32 N. Y. 65. 21 Barb. 596. 26 Penn. 108. 20 Texas, 688. Id. 719. 2 Head, 339.

⁶ 41 Barb. 307. Sec 42 id 98.

⁷ 30 N. Y. 344. 37 id. 657. We are obliged to omit a discussion of the question in other states, because of the space it would require.

non-executing partner will be inferred from slight circumstances, and will, when it exists, legalize the assignment. Thus, where an absconding member of an insolvent firm went to his partner, saying he assigned his interest in the business to him, enjoining him to "take charge of anything in *our* business; close it up speedily," &c.; or even where he simply absconds and leaves no direction, or is absent, and has relinquished all control and management of the business of the firm, in those and similar cases the assignment is sustained.¹ But a simple absence of some of the members on the business of the firm, even though it is insolvent, will not authorize the others to execute such an assignment.² If they do it, however, no one but the absent partners can question its validity.³ If one dies, the surviving partners can execute it.⁴

It will be noted that we make no reference to the changes in the above rules made by the United States general bankruptcy act of 1867.

§ 194. Each of the partners is liable for articles furnished for the benefit of the firm, although the vendor does not know of the existence of the partnership, and supposes that he is dealing with and giving credit only to an individual partner, and charging him alone on his books. And it makes no difference if the sale was by a written agreement, signed by the vendor and the partner in his individual name only.⁵

§ 195. Where an ostensible or known partner retires from the firm, he will continue liable for debts contracted under the firm name, or in the scope of the partnership business, as to all persons who have previously dealt with the firm, though but in a single instance, until actual notice of the dissolution of the partnership; and this notice may be personally given or by letter, or in other ways, or it may be implied from circumstances which satisfy the jury that the notice was received.⁶ One of these would be a change of the firm name, provided the change was such as to show the retirement of the partner.⁷ In many instances, also, while publication in

¹ 30 N. Y. 344. 29 Barb. 560. 43 id. 182. 1 Hill, 572. 3 Comstock, 168. 2 509. 3 Duer, 1. Kern. 283. 20 N. Y. 244. 35 id. 500. 38

² 43 Barb. 511. 6 Bosw. 123. S. C. 18 id. 94. 5 Transcript, 352. Id. 354. 6 How. Pr. R. 442. Barb. 244. 26 id. 607. 33 id. 458. 6

³ 28 Barb. 593. 4 Wash. C. C. R. 232.

⁴ 3 Paige, 517.

⁵ 4 Cowen, 282. 5 Denio, 183. 16 Barb. Cal. 343. 4 id. 260. 15 id. 321. 18 Pl. 608. 36 N. H. 167. 37 id. 76. 40 id. 455. 8 Ind. 215.

⁶ Story on Part. § 160. Coll. on id. § 533. ⁷ 6 Hill, 595. 24 N. Y. 550. 26 Barb. 6 John. 144. 6 Cowen, 701. 22 Wend. 607. See 3 Comstock, 168.

a newspaper is not of *itself* equivalent to actual notice, proof that the party took the paper, is a fact from which the jury may infer it.¹

As to those who have had no dealings with the parties, or such as not to call for credit, as where there has only been a single prior cash sale to the old firm, it is said that unless the retiring partner still suffers his name to appear as one of the firm, he will not be liable to mere strangers for the future liabilities of the firm, even if he does not give any notice of his retirement.² And he certainly is not if he gives public notice, as in a newspaper, even if the new creditors have never seen it.³ In respect to a dormant partner, no notice whatever is requisite, he being free from the acts of his copartners by dissolution alone.⁴ On the other hand, if a new partner is introduced into the firm, he will not be liable for its debts in the absence of any valid agreement to that effect by the new firm.⁵

§ 196. While a partnership continues each partner can employ an agent, or bind the partnership by any contract with third persons within the scope of the business, or where it is for the benefit of the partnership.⁶ This was held where one partner drew his own bill and gave an engagement in the name of the firm to the person on whom it was drawn, to take care of it if he would accept it, the other partner objecting to the guaranty. The bill, after being accepted, was applied to pay rent due by the partnership. The acceptor having paid it, it was held that he could recover upon the guaranty.⁷ An agreement between the partners that neither should make a contract to charge the others, will not affect the validity of contracts made by one with third persons having no notice of it, if the contracts are within the scope of the partnership.⁸ But one partner cannot bind his copartner by a covenant not connected with the partnership business,⁹ and notice to third persons of its limited nature will be inferred from a publication of the nature of

¹ 1 Hill, 578, note a, and refs. 22 Wend. 191, 192. 36 Pa. 114. 23 Mis. 185. 4 Cal. 260. 18 Ill. 37. 40 id. 455.

² Story on Part. §§ 160, 161. Coll. on id. §§ 532, 534, 535. 2 Kern. 283.

³ Story on Part. §§ 160, 161. 7 Cowen, 701. 2 Kern. 283. 20 N. Y. 240. 5 Bosw. 1. 10 Mich. 819.

⁴ 5 Cowen, 534. 1 Hill, 578, n. a. 9 Ind. 375. 36 Pa. 325. 37 Ill. 76.

⁵ 14 Iowa, 251.

⁶ Story on Part. § 126. Coll. on id. § 384. 3 Kent, 40, 41, &c. 1 Denio, 402.

33 Barb. 323. 40 id. 368. 46 Ill. 211. 17 Wis. 126. One case holds that after dissolution one of the partners may employ counsel to aid him in settling the business of the firm. 4 Kansas, 240.

⁷ 5 Denio, 541. See also 2 Comstock, 469.

⁸ Story on Part. § 105. Coll. on id. §§ 386, 387. 1 E. D. Smith, 540. 4 Sneed Tenn. 229.

⁹ 27 Mis. 536. 6 Mich. 274. Story on Part. §§ 110, 111, 112. Coll. on Part. § 483. 17 Iowa, 567. 23 id. 53.

the partnership at its formation. It may also be shown by other circumstances.¹ After dissolution a partner has not the right to give the firm note for a pre-existing debt, or to renew its notes, or to endorse a note previously given to it, in the absence of express authority; authority to settle up the firm business is not enough.²

§ 197. In like manner, any money or property lent or sold to one of the partners to be used in the business of the partnership, is a valid debt against the firm.³ Thus money lent to a partner to defray the expenses of traveling on the partnership business is a debt of the firm, and money lent or paid to a partner to be applied by the partnership in a particular manner within the scope of its business, but which he misappropriates, can be recovered of all the partners, without proving their assent to it, or that it was actually applied to the use of the firm; indeed the other partners are liable, even though the one borrowing the money appropriates it to his own use, unless the lender knew of this intended misappropriation.⁴ If a known partner gives his individual note for money borrowed for and used in the business of the firm, he only and not the partnership is liable therefor.⁵

§ 198. A partner may assign an account due the firm; that a seal is attached to the assignment will not vitiate it.⁶ If he be guilty of a deceit in the purchase of goods for the firm, or commits a fraud in the course of transacting any other of its business, the firm is liable therefor, even though the other members had no knowledge of, or participation in it, unless on learning of it they repudiate or disaffirm the whole transaction.⁷

§ 199. In transactions relating to the partnership, during its continuance the acts of each partner are considered the acts of all, and all acknowledgments or entries made in the partnership books by one are binding upon all.⁸ And if the acts are within the usual scope of the partnership dealings, with persons acting in good faith, they are valid, although done by one partner for his individual advantage. Thus if a partner obtain money upon a note made, or a bill

¹ 4 John. 251. 20 id. 200. 2 John. 1 Denio, 402. 35 Barb. 120. 53 id. 272. Cases, 171. 4 E. D. Smith, 469. 4 Minn. 242.

² 14 Iowa, 108. 20 Wis. 279. 37 Mo. 453. 3 Kent, 63. Story on Part. §§ 322, &c.

Story on Part. § 126. Coll. on Part. §§ 390, 391. 24 Ill. 317. 4 Nevada, 45.

⁴ 5 Wend. 223. 16 id. 505. 17 id. 47.

³ 41 Mo. 274. 35 id. 428.

⁵ 5 Hill, 163. 7 id. 585; infra § 207.

⁷ Coll. on Part. § 445. Story on id.

§ 108. 24 Barb. 549. 2 Sand. 421.

⁸ Story on Part. § 107. Coll. on id. 779. 3 Kent, 40. 15 John. 409. 3 Pick. 177. 19 Ill. 59.

of exchange drawn, endorsed or accepted by him in the name of the firm, for its use, the note or bill will be good against all the partners.¹ So if it be made, drawn, endorsed or accepted ostensibly for the use of the firm, it will in the hand of a *bona fide* holder be good, notwithstanding it was not for the partnership, and even if it is accommodation paper, fraudulently procured to be made to his firm, and then transferred in its name for his benefit.² As to admissions by the partners before and after dissolution, see *infra*, § 1399.

§ 200. A note given by one of the partners in the name of the firm, will be intended to have been made in the course of partnership dealings, and the burden of proof is upon the other partners to do away this intendment, by showing that the note was given against their knowledge or assent in a matter not within the scope of the partnership business, and that to the knowledge of the payee.³ Where, upon the renewal of an accommodation note, the borrower presented to his endorser for signature a note signed by him, with the name of his firm as makers, of which firm he had recently become a member, the endorser was held chargeable with notice that the note was given for the individual debt of the borrower.⁴ If, however, the proceeds of the note were in fact applied to the use of the partnership, the note will be available against all the partners, and this, notwithstanding one of the partners dissents or objects to it.⁵

§ 201. A partnership may become liable for the acts of one of its members by a subsequent assent to his unauthorized acts.⁶ In such cases the evidence must be strong and satisfactory. Slight and inconclusive circumstances will be disregarded.⁷ Mere knowledge on their part of the transaction after it has taken place, and nothing more, is insufficient.⁸

§ 202. A note given by a partner in the name of his firm, for moneys collected by him as the agent of the payee, is valid against the firm, if the moneys were in the nature of a loan to it.⁹

§ 203. A debt due to the firm cannot be discharged by applying it

¹ 3 Kent, 41. 16 Wend. 505.

¹⁴ Wend. 133.

² 3 Kent, 43. Coll. on Part. § 447. 15 Wend. 364. 18 id. 466. 20 id. 251. 22

¹¹ Wend. 75. 5 Denio, 541. 2 Coms.

id. 333. 23 id. 311. 16 N. Y. 135. 5 Duer, 383, 388. 6 id. 309. 4 Cal. 22. 6 id. 141.

⁴ Seld. 398. 15 N. Y. 577. 18 Ill. 32. 3 Minn. 166.

¹⁴ Wend. 146. 2 Bosw. 188. 18 Ill.

¹¹ John. 544. 6 Wend. 615. 16 id. 32.

505. 53 Barb. 272. 6 Hill, 114. 34 Pa.

⁹ 19 Barb. 326.

344. 39 Maine, 157. 18 Ill. 32. 27 Mis. 401.

¹⁶ Wend. 505.

to one due by one of the partners, without a general agreement to that effect, or the consent of the other partners.¹ And a partnership security given by one partner for his individual debt, without the knowledge and consent of his copartners, to the knowledge of the party receiving it, will not bind them unless in the hands of a *bona fide* holder.² If given with their consent it is, of course, valid in the hands of any holder.³

§ 204. An accommodation endorsement of a promissory note in the firm name by one of the partners, for the security of the debt of a third person, does not bind the other partners unless they were previously consulted, or subsequently assented to the transaction.⁴ So where one of the partners signs the firm name to a note, or draws a bill, as surety for a third person,⁵ an authority from the other partners may be shown by circumstances.⁶ But where one partner guaranties a note given by another partner in the firm name for his individual debt, the guaranty is a waiver of any objection he has to it, and so would his assent to the accommodation endorsement be.⁷

§ 205. Where the partnership is limited to a particular business or is any otherwise special, if its limited or special nature has been published in the newspapers, or is otherwise generally understood, and is strictly adhered to by the partners, a creditor must at his peril see that his dealing with an individual partner relates to the joint concern, and if it does not, the other partners are not bound without their assent, and a knowledge of the limited nature of the partnership may be inferred from circumstances.⁸

§ 206. If a creditor of a firm, either before or after its dissolution, receive from one of its partners his individual note or bill of exchange or other security, in payment of the debt, it will discharge the other partners of the firm. The intention, however, must have been to receive it in payment, and if it was not, it is only a collateral security for the payment.⁹

§ 207. One partner cannot, without express authority, bind his

¹ 3 Kent, 42. 2 Caines, 246. 2 John. 300. 7 Wend 328. 1 Hall, 348. 19 Barb. 326. 3 Ind. 159. 11 Iowa, 228. 26 Ill. 231. 42 id. 225. 46 id. 211.

² 3 Kent, 43. 1 Story on Con. 224, a. Story on Part. § 132. Coll. on Part. § 496. 4 John. 251. 16 id. 34. 4 Hill, 259. 4 Kern. 628.

³ 37 Mo. 563.

⁴ 1 Wend. 529.

⁵ 7 Wend. 158. Id. 309.

⁶ 4 Seld. 408.

⁷ 10 Pick. 147.

⁸ 1 John. Cases, 171. 2 John. 300. 4 id.

⁹ Story on Part. §§ 155, 156. Coll. on id. §§ 557, &c. 12 John. 409. 1 Cowen, 290. 22 Wend. 182. 3 Denio, 410. 20 Barb. 532. 6 Bosw. 578 and refs. 4 Sneed, 501. 11 Ind. 22. 27 Ill. 46.

partners by an instrument under seal, to pay money, or sign an appeal bond in its name.¹ He may, however, by an instrument in the name of the firm, under seal, authorize a third person to discharge a debt due to the partnership, or may release it himself, or may sell a demand due to it and transfer it by a sealed instrument.² He may, however, be authorized by his partner, either in writing or verbally, to execute an instrument under seal, and this authority may be inferred from the general transactions of the partnership, or from the assent of the partners.³ If the instrument is one that would have been good if unsealed, then the addition of a seal, though unauthorized by his partner, will not vitiate it.⁴

§ 208. A very nice distinction has been drawn in relation to partnership liabilities upon sealed instruments, under the general rule laid down in the preceding section. If one partner execute a bond in the name of the partnership, and I guaranty it, if I pay it I cannot maintain an action against both partners for the money paid. But if in the same case I should advance money to the partner who signed the bond to enable him to pay it, I could recover against the partnership for the money lent.⁵

§ 209. One partner cannot bind another without his consent or subsequent ratification, by a submission of matters arising out of the firm business to arbitration, for the reason that there is no implied authority except such as is necessary to carry on the joint business.⁶ Where, however, an award on such a submission is made, and the partner making the submission accepts the award, and gives the person paying it a receipt in full, the receipt operates as a release of the partnership claim, by way of accord and satisfaction.⁷ The one making the submission is always bound by it, and so is the other party.⁸

The rule varies in the different states, under their statutes, as to the power of one partner to bind the firm by a confession of judgment made without the assent of the others, or their subsequent approval. In New York it was formerly held that he had no power, except when brought into court by service of process on himself and

¹ Story on Part. §§ 119, &c. 19 John. 513. 1 Wend. 326. 12 id. 53, 55, and refs. 1 Oregon, 339. ⁴ Story on Part. § 122. 5 Hill, 113. Id. 163. 1 Seld. 240. Supra, § 198.

² 3 John. 68. 14 id. 387. 17 id. 58. 20 Wend. 251. 22 id. 324. 5 Wis. 138.

³ Story on Part. §§ 121, &c. 19 John. 513. 1 Hall, 262. 3 Comstock, 150. 1 Seld. 240. 21 How. Pr. R. 217. 13 Iowa, 455. 14 Wis. 683.

⁵ 15 John. 409.

⁶ Coll. on Part. §§ 439, 485. Story on Part. §§ 114, 115. 1 Pet. 221. 9 John. 285. 1 Wend. 326. 15 Barb. 526. 5 Cal. 345.

⁷ 19 John. 137.

⁸ 1 Wend. 326. 15 Barb. 527. 5 Cal. 345.

partner, to confess a judgment which would bind anything beyond his own individual property, or his interest in the avails of the partnership property after the payment of its indebtedness.¹ And such is the rule at common law.² But under the act of New York (*Stat.* 1833, p. 395, § 3), a confession by one defendant, after service on him only, or by an attorney authorized by him alone, will bind not his goods alone, but those of the partnership.³

§ 210. The only action that can be brought between partners in relation to their partnership transactions is an action of account, or to settle up the business of the firm. This is not within the jurisdiction of a justice of the peace.⁴ Where, however, partners have accounted together and ascertained the balance due from one to the other, an express contract to pay this sum, or even, as some authorities hold, an implied one, will authorize an action for the amount, and which, if the sum is not too large, may be brought in a justice's court.⁵ And when there is such a balance struck and a promise to pay, an action may be maintained although, by accident or otherwise, some trifling debts owing by the firm remain unadjusted.⁶

§ 211. With the exceptions already mentioned,⁷ partners must sue and be sued jointly.⁸ If one of the partners be an infant, it is still necessary that he be joined.⁹ Actions by partners must be commenced in and prosecuted in the proper christian and surnames of the parties, and not in the name of the company or firm.¹⁰ But when the plaintiff is ignorant of the name of a defendant, he may designate him by any name, and when his true name is discovered the pleading or proceeding may be amended accordingly.¹¹ If a partner die, actions must be commenced in the name of the surviving partner or partners.¹² In Indiana it is held that it is not necessary to notice a deceased partner in the declaration.¹³ The survivors only can sue, or are liable to an action at law, the representatives of the

¹ Coll. on Part. § 469 and note. 1 Wend. 115. Id. 344. 10 Iowa, 332. See 27 Ind. 311. Id. 335. 20 id. 609.

² Coll. on Part. § 469 and note. 10 Iowa, 535. 12 id. 607. 13 id. 496.

³ 10 Wend. 630. 22 How. Pr. R. 209. S. C. 13 Abbott, 192. See contra, 22 How. Pr. R. 265.

⁴ 12 John. 401. 43 Barb. 379. Also 32 Wis. 651.

⁵ 2 Com. on Con. 205. 2 Caines, 293. 17 John. 80. 1 Wend. 132. 1 Hall, 180. 19 Barb. 196. 27 Mis. 436. 5 Har. Del.

115. Id. 344. 10 Iowa, 332. See 27 Ind. 311. Id. 335. 20 id. 609.

⁶ 16 Wend. 601.

⁷ Ante, §§ 192, 193.

⁸ Coll. on Part. §§ 649, 712. Story on Part. §§ 234, &c. 12 Cush. 431.

⁹ 13 Barb. 536. 1 Bosw. 332.

¹⁰ 10 Ind. 218. 8 Mich. 493. Code of Iowa, § 1690, and 7 Clarke, 259. 45 Barb. 269.

¹¹ N. Y. Code, § 175 (150). 2 Cal. 562.

¹² 6 Cowen, 441. 18 Wis. 160.

¹³ 6 Ind. 64.

deceased partner not being proper parties, except in certain cases in equity.¹ After the firm is dissolved, by death of one of its members or otherwise, the survivors have the sole right to the possession of the partnership property.²

[§ 211a.] By the laws of New York no person is allowed to transact business in the name of a partner not interested in his firm, and the designation, "and company," or "& Co.," must represent an actual partner or partners.³ Under this instruction the parties may give to their firm any name they please, as "The Union Towing Company," and then use the name of the several partners in their litigation;⁴ or they may use the name of one only of their firm.⁵

§ 212. Wherever one person may lawfully enter into a contract, two or more may *jointly* do it, in which case an action must be brought against all the joint contractors, if alive, or the survivors or survivor if one of them be dead. They may also bind themselves by a *joint and several* contract, in which case the party with whom the contract is made, may regard it as a joint contract against *all* the parties, or as a several contract made by each of them.⁶ In either case, until a satisfaction be made of the principal demand, one may pursue his remedy against all the contractors. When, however, the principal demand is satisfied by one, the creditor can only proceed to collect the costs which he may have recovered in his judgment against any other of them.⁷ If he receive the satisfaction of the principal demand of one, before judgment in his actions against the others, the fact would not be a bar in those actions to his recovering costs.⁸ Where several actions in our courts were brought against the maker and endorsers of a note, and the maker paid the note, the plaintiff was permitted to discontinue his action against the endorser without costs.⁹ The same rule would doubtless be followed in the case of joint and several contractors, where actions were brought against them severally.

§ 213. A contract may also be made to pay, or to do such a thing to or for several persons *jointly and severally*. Here they must all join in bringing an action upon the contract, unless their interest be really several, as where a certain part is in fact and by the terms of the contract due to one, and another part to another.¹⁰

¹ 30 Barb. 110: aliter in Ohio under their Code, § 38. 5 Ohio, 586.

² 18 Wis. 169.

³ Laws of 1833, ch. 281, p. 404. 3 R. S. (Banks' 5th ed.) 978, § 42.

⁴ 45 Barb. 269.

⁵ 1 Denio, 402.

⁶ 1 Esp. N. P. 140. 1 Parsons on Con. 11, 12. 9 Mich. 380.

⁷ 10 Mass. 88. 9 John. 327.

⁸ 10 Mass. 88. 4 T. R. 691.

⁹ 19 Wend. 98.

¹⁰ 1 Esp. Dig. part 2, 88. Id. 143, 144.

§ 214. The actions upon contract which are brought in a justice's court, will generally arise upon some one or more of the following grounds:

1. On special agreements, sealed or without seal, and either written or verbal, to do or not to do some particular act, which agreements are unexecuted.
2. For goods sold.
3. For work and labor.
4. For money had and received to the plaintiff's use.
5. For money paid for defendant.
6. For money lent.
7. For the use and occupation of lands and tenements.
8. Upon bills of exchange and promissory notes.
9. Upon an account stated, or a balance due on settlement.

The rights of the parties under each of these heads will be examined in their order.

§ 215. I. SPECIAL AGREEMENTS. These are agreements whose terms have been distinctly settled by the parties, either in writing or orally. They are called special because their terms are *specified*. They may be as various as the commercial necessities and purposes of mankind. And where made upon good consideration, and not in violation of any rule of law, they may be enforced by either party to them.

§ 216. In all actions upon this class of agreements, their terms must be set forth substantially in the complaint, and the particular default of the defendant alleged, and the evidence must correspond with the allegations in the complaint.¹ Thus, if I have commenced an action against you before a justice, and we come to a settlement, and I agree to discontinue the suit, but instead thereof go on in your absence and take a judgment against you, I have broken my agreement and you are entitled to an action against me upon it.² Now, in your suit against me, you must in your complaint allege that such former action was pending, that, in consideration of your reckoning and settling with me, I promised to discontinue the suit, and that I did not discontinue it, but proceeded with it and obtained judgment against you. You must then prove each of the specific facts alleged: 1. The pendency of the former suit as stated in the complaint; 2. The consideration alleged, that we had reckoned and settled, and not that I agreed to discontinue for some other reason; 3. That I promised to discontinue the suit, because if the proof

¹ 12 Texas, 327. Esp. Dig. N. Y. ed. part 1, 262 to 264.

² 8 John. 470, and see 40 Barb. 514. 43 id. 318.

should be that we made the settlement and I made no promise to discontinue the suit, or had promised to discontinue it upon your performance of some other condition, it would not sustain the complaint; and 4. That I proceeded to obtain judgment in violation of the agreement.

§ 217. In order to recover upon a special agreement, the plaintiff must have performed all the duties required on his part by its terms, to be performed before the default of the defendant.¹ As where A hires B to work for him a year, and agrees to pay him monthly for his services, and neglects to pay him, and B leaves his service, A cannot maintain an action against B for not remaining with him during the year. But if the bargain had been that A should pay at the end of the year, then A not being in default, can recover for his loss of the service.

§ 218. The terms of any special agreement, whether sealed or without seal, may, upon a sufficient consideration, be varied by the parties at any time before a breach, and without any further consideration than the varying agreement, if the contract as so varied is fully *executed*. Thus, where a plaintiff by an instrument under seal, agreed to erect a house for a fixed price, which was not an adequate consideration, and having done a part of the work, refused to proceed, but on a verbal promise of the defendant, that if he would go on and complete it, he would pay him for his labor and materials, he completed the work; it was held that he might recover upon the contract as so changed.² But a contract under seal cannot be modified by an *executory* agreement not under seal.³

§ 219. Where the time of payment is provided for in a written contract, or where no time of payment is specified, in which case the law construes it payable immediately, a verbal agreement made at the time of its execution, fixing the time of payment at a different one from that expressed in or implied from the written instrument, or in any manner varying its terms, is inadmissible, on the ground that it would be to vary a written contract by parol.⁴ Nor would a subsequent parol agreement be binding to vary it, where the first would, if by parol, be void by the statute of frauds, as where it concerns lands; nor can a valid contract be modified by a subsequent one

¹ 13 John. 94. Id. 390. 19 id. 337. 8 6 Ohio, N. S. 1. 7 Wis. 516. 18 Cal. 160. Cowen, 63. Infra, §§ 272, &c. 9 Pick. 298. See 28 N. Y. 147.

² 14 John. 330. 7 Cowen, 48. 29 Barb. ³ 10 Wend. 180. 13 id. 71. 21 id. 628. 410. 4 Ind. 75. 12 id. 563. 15 id. 164. 23 id. 82. 20 Ill. 101.

⁴ 8 John. 189. Lalor, 398. 19 Ind. 89.

void by the same statute.¹ But if the subsequent agreement does not contradict the original one, whether sealed or verbal, but merely dispenses with the performance of some of its terms, or the time of its execution, it is good, even under the statute of frauds; as in the case of a contract to deliver goods at a stipulated period, parol extension of the time of delivery is admissible.² And so, an executed agreement for a valuable consideration and by parol, to extend the time of payment of a mortgage is valid.³

§ 220. By various provisions of the statutes, certain public officers may make contracts which are binding upon themselves and their successors. In all such cases, where contracts have been made by the supervisors, the loan officers or commissioners of loans of a county, the county superintendents of the poor, the supervisors of towns, overseers of the poor, commissioners of highways, or trustees of school districts, such officers may bring actions in the name of their respective offices to enforce such contracts, notwithstanding the contracts may have been made with their predecessors in their individual names.⁴ Actions against them must be brought against them individually, specifying in the process, pleadings and proceedings, their name of office.⁵

§ 221. II. ACTIONS FOR GOODS SOLD. These may be brought whenever any personal property has been sold, either at a price agreed upon, or left to be implied by the law, at what it is reasonably worth. The action may be where the defendant has received the goods by an actual delivery or its equivalent, or where he has simply contracted to purchase and refused to take and pay for them.⁶ A contract to sell an invoice of sugar, more or less, "to arrive on or before" a certain time, is an absolute sale not depending on its arrival by the time, or of some of the invoice being destroyed before arrival;⁷ but an agreement to send to another a force pump represented to do certain work, or to be returned if it did not, or if not liked, is a conditional agreement only.⁸ In either case of sale, the plaintiff may recover the value of the goods sold, and where they are not taken

¹ 15 John. 204. 1 Maule & Seld. 21.
17 Ind. 167. See 15 id. 164.

⁵ Id. § 96 (109).

⁶ 30 Barb. 206. 34 id. 201. Id. 330. 2

² 1 John. Cases, 22. 3 John. 528. 12 Barb. 366. 20 id. 42. Id. 509. 6 Duer, 208. 1 Hilt. 254. 6 Iowa, 350. 18 Cal. 115.
4 Greene, Iowa, 181.

Bosw. 166. 5 id. 559. 6 id. 57.

⁷ 16 N. Y. 595. 35 Barb. 515, but see 4 Comstock, 122.

⁸ 38 Barb. 128. Also 2 John. Cases, 253. 13 John. 219. 14 id. 167. 16 Wend. 494.

³ 30 N. Y. 294.
⁴ 2 R. S. 473, §§ 92, 93. 3 id. (Banks' 5th ed.) 774, §§ 105, 106.

and paid for, he may retain them in his possession as a pledge until he obtains satisfaction of his judgment, either by sale of them upon his execution against the purchaser, or in some other manner.¹ If goods are sold on condition that they may be returned if they do not correspond with a warranty, and they are returned accordingly, and accepted, unconditionally, by the vendor, the agreement is at an end, and the vendor cannot recover the price, even if he shows there was no breach of the warranty.²

§ 222. Where the goods were sold and *delivered* to the defendant, the delivery should, with the bargain of sale, be alleged in the complaint. If, however, the defendant has refused to receive and pay for the goods, and they have not been delivered, the contract of sale should be stated, and the fact that the plaintiff had offered to deliver, and the defendant had refused to receive and pay for them.³ If the delivery is to be in the future, but the vendor, before the time, gives notice or induces the vendee to think that he will not perform, or disables himself from doing it, as by a sale and delivery to a third person, this releases the vendee from performance on his part, and he is relieved from averring or proving performance or an offer to perform.⁴

§ 223. If no time is fixed for delivery, it must be in a reasonable time, and an action may be brought as well by the purchaser as by the vendor, if the latter fail to comply with his contract of sale by delivering the goods.⁵ In this case, the purchaser is entitled to recover from the vendor the difference and interest between the contract price and that which similar goods were worth at the place of delivery on the day when they were to have been delivered.⁶ It will not change the rule of damages, if it appear that the purchaser had agreed to sell them at a price above the market, and lost the opportunity of making a profit thereby.⁷ If the purchaser has returned the goods, the vendor cannot recover the difference between the contract price and that for which he resold them.⁸ If the goods have

¹ Ante, § 85. 5 John. 395, 404. 15 Wend. 493. 34 Barb. 301. 1 Sand. 297. 1 E. D. Smith, 590. 4 Sneed, 557. 9 Ind. 566.

² 15 Wis. 50.

³ 11 John. 178. 21 N. Y. 462. 19 Barb. 416. 38 id. 200. See 20 Ill. 639.

⁴ 2 Pars. on Con. 188. 5 Cowen, 506. 7 id. 24. 23 Wend. 66. 34 Barb. 333. Id. 378. 6 Bosw. 202. 1 E. D. Smith, 463. Also 35 Cal. 229.

⁵ 34 Barb. 378. 37 How. Pr. R. 104.

⁶ 8 Wend. 435. 1 Seld. 537. 2 Kernan, 40. 20 Barb. 42. 34 id. 204, 333. 35 id. 515. 38 id. 228. 3 Sand. 585. 4 E. D. Smith, 14. 3 Mich. 55. 1 Iowa, 98. 33 Mis. 150. See further as to the rule of damages, *infra*, § 1507, &c.

⁷ 24 Wend. 322. See 16 N. Y. 492.

⁸ 1 Cowen, 345.

not been delivered, and the purchaser has paid a part of the purchase price, he may recover that back;¹ if the vendee refuses to take them, and the vendor sells them fairly, after notice to the purchaser of his intention to do so, and sues to recover the balance between the proceeds and contract price, the amount brought on the sale is conclusive as to their value, although the purchaser had not a further notice of the time and place of the sale.² Otherwise, if no notice was given of such intention.³ If the debtor agrees to deliver to his creditor goods at a stipulated price in payment, and fails to do so, the creditor in an action therefor may recover the amount so agreed to be paid, although the market value of the goods themselves is less than the price at which they were to be received.⁴ If there is no evidence of the market value in a suit for refusal to receive, a nominal sum only can be recovered.⁵

§ 224. Where, however, the purchase price has been paid in advance, and the vendor fail to deliver the goods, the purchaser may, if he bring his action within a reasonable time, recover according to the highest market price at any time between the period of delivery and the day of trial,⁶ or the purchase price and interest in the absence of evidence of special damages.⁷ If the purchaser induces the seller to contract to sell by fraudulent representations, he cannot recover damages for the vendor's refusal to deliver the property on account of the fraud. The fraud may be shown by way of defense.⁸

§ 225. In determining the right of parties to bring actions upon contracts for goods sold, an examination of the principal rules in relation to sales will in many cases be necessary. Some of them, and especially those which are provided for by the statute of frauds, have been examined in the former part of this treatise.⁹

§ 226. Where, upon a sale, no particular time was fixed for the payment, the payment and delivery are concurrent acts, and the vendor may refuse to deliver without payment,¹⁰ and may retain the article as a pledge until the payment is made, and in the meantime the title does not pass;¹¹ or if not made within a reasonable time, as

¹ 7 Bosw. 108.

⁷ 6 Mich. 348.

² 30 N. Y. 549. 10 Bosw. 39. See 36 Barb. 364. 45 Ill. 80.

⁸ 30 N. Y. 655.

⁹ Ante, §§ 81, &c. 88, &c.

³ 29 Barb. 454.

¹⁰ 2 Kent, 492, 496. 2 Bl. Com. 448. 3

⁴ 3 Bosw. 181. See also 5 Wend. 393.

Cowen, 84. 6 id. 110. 4 Barb. 564. 21

⁵ 23 Barb. 546. 42 id. 227.

Ill. 238. 38 id. 533.

⁶ 7 Cowen, 681. 9 Wend. 129. 22 id. 366. 25 id. 417. 32 N. Y. 616. 2 Iowa, 101. 3 id. 242. See 3 Sand. 614. *Infra*, § 1507, &c.

¹¹ Ante, § 221 and refs. 1 Pars. on Con. 440. 15 Iowa, 277. 36 Mo. 479.

if delayed until the next day, he may, if he has not permitted the purchaser to reduce it to possession by marking it with his name, or putting his seal upon it, disregard the sale.¹ If, however, he freely and absolutely delivers it to the vendee without any fraudulent contrivance to obtain its possession, and without exacting or expecting simultaneous payment, there is confidence and credit bestowed, and the precedent condition of payment is waived and the title passes.² If payment was to have been made in the notes of a third person, who becomes insolvent before the time of delivery, the vendor is not bound to deliver upon a tender of the notes, although they are not entirely worthless;³ and, on the other hand, if after the goods have come to the vendee's possession, on discovering his own insolvency, he deposits them in a warehouse for the vendor, and notifies him of it, the vendor's claim will prevail over the lien by attachment, of another creditor, although levied before the vendor had signified his assent to the deposit for him.⁴

A waiver of payment on delivery of a portion of the goods, will not be a waiver of payment on the delivery of the remainder.⁵

§ 227. Where, however, payment is expected simultaneously with the delivery, and is omitted, evaded or refused by the purchaser upon getting the goods in his control, the delivery is held to be *conditional*, and the non-payment an act of fraud entering into the original agreement, vitiating it and rendering it void, and the vendor may instantly reclaim his goods.⁶ If it was a condition of the contract that the seller was to receive, upon delivery, a note or security for payment, and he delivers the thing sold, at the same time declaring that he shall not consider it sold until the security be given, the delivery is deemed conditional, and the title does not pass.⁷

§ 228. The rule in relation to conditional deliveries is applied to a great variety of cases arising in commercial transactions, where sales are made for cash or specified securities, as chattel mortgages or approved notes, and the custom of the trade is to deliver the goods sold to the purchaser and to call upon him for the cash or notes within a day or two, or at a particular day of the same week; as in the case of auction sales in New York, where the buyer takes

¹ Holt, 8. Skinner, 647. 19 Barb. 425 and refs.

² 21 N. Y. 399.

³ 2 Kent, 496. 6 Cowen, 110. 1 Denio, 51. 1 Seld. 44.

⁴ Supra, § 97. 2 Kent, 497. 13 John. 434. 6 Cowen, 110. 1 Denio, 571. 2 Hall, 345. 23 N. Y. 266. 19 Barb. 266.

⁵ 16 N. Y. 595; so as to the insolvency of the vendee. 1 Pars. on Con. 446.

⁶ 27 Mis. 45.

⁷ 4 Mass. 404. 14 Ind. 459.

⁸ 24 N. Y. 538.

the goods and pays the cash, or furnishes the approved notes when called for within a day or two;¹ or where the custom in sales of flour for cash, was for the purchaser to receive the flour and pay for it when called upon for it the next day.² In one case, goods were sold in New York to a dealer in the country, upon his agreeing to return home and immediately to send certain securities for them, and the goods were shipped to his address. Upon his failure to send the securities the goods were reclaimed, and the delivery held a conditional one.³

§ 229. Where there has been a conditional delivery, in order to render the sale absolute the purchaser must comply strictly with the terms of the contract of sale.⁴ If the terms were cash, it will not be sufficient to tender a part cash and the seller's note for the balance.⁵ And the delivery will be deemed conditional, in a sale for cash, whenever anything remains to be done by either party to ascertain the amount to be paid (as to weigh or measure the goods), until that is done and the price paid.⁶ Where a delivery is apparently absolute, and without any cotemporaneous declarations qualifying it, the *onus* of proving it a conditional one vests with the vendor.⁷ Where one sold sheep, for which he was to be paid fifty dollars down, the vendee agreeing to pay fifty dollars more in three days, and in ten days to take the sheep and pay the balance, and the first fifty dollars were paid, it was held that though the vendee did not pay the second fifty dollars, or take the sheep and pay the balance as agreed, the vendor could not sell the sheep to a third person without first giving the vendee notice that he must take the sheep and pay the balance, or they would be resold, and the vendee called upon to make up the deficiency.⁸ But it is also held that where a person has purchased property in his own name, to be paid for in the notes of a third person, and a portion is delivered, for which he then refuses to pay on the ground that he was the agent of another, and therefore not liable, the vendor is not bound to deliver, or tender, or offer to deliver the residue of the property.⁹

§ 230. The neglect on the part of the seller to enforce the terms of the contract of sale, or to rescind it on the failure by the pur-

¹ 2 Kent, 497. 14 Wend. 31. 22 id. 659.
19 Barb. 266. 25 id. 474. 28 id. 393.

² 23 Wend. 372. 1 Paige, 312.

³ 1 Paige, 312. See 15 Iowa, 277.

⁴ 3 Cowen, 84. 27 Mis. 45. See 17
Mass. 612. 17 Wis. 477.

⁵ 1 Denio, 571.

⁶ 7 Wend. 404. 15 id. 222. 6 Seld. 288.

⁴ Kern. 617. 19 Ark. 566.

⁷ 1 Seld. 41. 3 Duer, 341. 9 Wis. 152.

⁸ 29 Barb. 315.

⁹ 6 Bosw. 57.

chaser to comply with them, will be deemed a waiver of those terms, in the case of a conditional delivery, where it continues a sufficient time to warrant a belief that the seller intended to give a further credit to the purchaser, and will pass the title of the goods sold.¹ For an unconditional delivery precludes the idea of any further title or lien in the vendor.² But where there was an agreement to deliver articles by the wagon-load, payment for each being made on delivery, and the vendee has delivered several loads without exacting the condition, that is not a waiver of his right to exact it as to the subsequent ones.³ So, where a contract of sale included rye, corn and oats at stipulated prices to be paid or secured on delivery, and the rye was delivered, and a part of it only paid for, it was held that the vendor had waived the terms of the contract as to the rye, and had no right to refuse to deliver the corn and oats, on the ground that the vendee had not paid or given security for the rye.⁴

[§ 230*a*.] If goods are sold and delivered under the agreement that the title thereto shall remain in the vendor until they are paid for, as between the vendor and the vendee the title does not pass, and they remain the vendor's property till full payment is made.⁵ But it is held in New York that, while they are not subject to levy and sale under an execution in favor of a third person against the vendee, yet, that if the vendee sells them to a *bona fide* purchaser, he will hold them as against the claims and title of the original vendor.⁶ In some of the other states, however, it is held that, in such cases, the *bona fide* purchaser from the vendee acquires no title till the goods are paid for.⁷

§ 231. A purchase with intent not to pay for the goods, is fraudulent, and renders the sale void as against the vendor, and he may reclaim them.⁸ But if he delivered them with intent to pass the property as well as the possession, a *bona fide* purchaser from the fraudulent vendee, that is, one who pays the price without notice of the fraud, acquires title as against the owner, although the latter

¹ 6 Cowen, 110. 6 Wend. 77. 25 id. 53 Duer, 20. 15 N. Y. 409. 36 id. 556. 640. 1 Seld. 41. 31 Penn. 324. 9 Wis. 2 Transcript, 340.

152.

² 6 Wend. 77. 8 id. 256.

³ 21 N. Y. 399.

⁴ 21 N. Y. 462.

⁵ 2 Hill, 326. 15 N. Y. 409. 3 Duer, 20. 192.

8 Iowa, 351. 9 id. 91. 15 id. 277. 36

Mo. 479.

⁷ 15 Iowa, 277. 36 Mo. 479. 32 Ill.

411. 46 id. 319.

⁸ 18 John. 204. 23 Wend. 611. 1 Hill,

302. 20 Barb. 494. 6 Bosw. 299. 41 Ill.

might have reclaimed them from his vendee.¹ But if goods, other than negotiable paper, and cash or bank bills, are stolen or otherwise taken from the owner without his express or implied consent, a *bona fide* purchaser will not acquire any title as against the owner.² A different rule prevails in England in respect to sales in *market overt*, as it is termed; but as there are no markets overt in this country, that rule does not prevail here.³

§ 232. If the purchaser had notice of such facts and circumstances as would naturally excite the suspicion of a man of ordinary prudence and caution (as where shares of stock were bought for a third of its market value, of a lad of sixteen), but does not make further investigation, he cannot be treated as a *bona fide* purchaser, even though he paid some value for the property.⁴ But if he has such notice, and on making further inquiry fails to discover the prior right, then he is a *bona fide* purchaser.⁵ He must also have given some value, or incurred some new responsibility, or have released, surrendered, or destroyed some security, upon the credit of the property, without previous notice of the fraud.⁶ It is not sufficient that he took the goods (they not being negotiable notes) from the fraudulent vendee in payment of a previous debt.⁷ Where the purchaser is not a *bona fide* one, the owner can repudiate the sale and reclaim them from an officer who has levied upon them as the property of the fraudulent vendee, or from a person to whom the debtor has turned them out in payment, or upon a mortgage for an antecedent debt, or from assignees for the benefit of creditors.⁸

§ 233. Where goods are purchased upon credit through false representations made by the purchaser, and the vendor took the note of the vendee, or other consideration for them, if he elects, as he may, to rescind the contract and reclaim the goods sold, he must first promptly return or offer to return the note or considera-

¹ *Infra*, § 581. 8 Cowen, 238. 13 Wend.

⁵ 15 N. Y. 354.

570. 25 Barb. 474. 45 id. 499. 3 Duer, 341. 6 Bosw. 299. 21 Ill. 330. 32 id. 411.

⁶ 24 Barb. 554. 31 id. 183. ³ 33 id. 215.

² 20 Wend. 267. 22 id. 285, 298. 3 Barb. 20. 3 Duer, 341. 5 id. 268. 4 Bosw. 156. 5 id. 121. 32 Ill. 411.

379. 6 Duer, 232. 5 Bosw. 421. 6 Mich. 143. 30 Mis. (9 Jones) 335. 3 Minn. 225.

⁷ 13 Wend. 570. *Infra*, § 581. 23 Cal.

³ 32 Ill. 411. 20 Wend. 276. 2 Kent, 324, and refs.

359. *Contra*, 16 Wis. 659.

⁸ 8 Cowen, 238. 13 Wend. 570. 23 id.

⁴ 2 Seld. 374. 28 N. Y. 600. 31 id. 597. 34 id. 247. 41 Barb. 307. 4 Duer, 101. 5 Ohio, N. S. 70. 17 Texas, 143. 6 Iowa, 279.

372. 1 Hill, 302. 17 N. Y. 249. 23 id. 264. 17 Barb. 446. 32 id. 171. 6 Duer, 171. 20 Mis. (5 Ben.) 446.

tion received.¹ Late cases hold, however, that where the vendor receives the purchaser's own note, it is unnecessary to tender it back until the trial; a previous tender is advisable as an evidence of a prompt disaffirmance of the sale, which is absolutely necessary.²

§ 234. When goods are sold upon credit and nothing is agreed upon as to the time of their delivery, the vendee is immediately entitled to their possession, and the title at once vests in him, subject, nevertheless, to the right of the vendor to reclaim them while on their passage to the vendee, if he become insolvent, or embarrassed, and probably not able to pay his debts,³ which may be inferred from circumstances.⁴ This right is called the right of stoppage *in transitu*. If property is sold without any expectation of immediate payment, it is a sale on credit.⁵

§ 235. The right of stoppage *in transitu* is confined exclusively to the vendor. It can only be exercised when the vendee is insolvent or embarrassed, as above, and the goods unpaid for in whole or in part, and where they are actually on their passage to the vendee. If they have come to his possession, or to that of his agent, the right is at an end, unless that agent is merely one to forward them to the vendee, and then it still continues.⁶ It is generally a question of fact for the jury to decide in what capacity such agent received the goods.⁷ If previous to their reaching the vendee he sells a part, the remainder may be stopped.⁸ If the vendee discovers his insolvency and then, though the goods have come to his possession, deposits them in a warehouse subject to the order of the vendor, notifying him thereof by letter, the vendor's title will prevail over the vendee's creditors, the vendor's assent to the deposit being presumed.⁹ The same rule applies where, when they reach their destination, the vendee who has become insolvent, refuses to receive them, and requests a third person to take possession of them for the vendor, which he does.¹⁰ This stoppage does not operate to rescind the sale, but simply to revest the vendor with the possession of the goods in the way of a pledge, and the vendee is entitled to them upon payment or tender of the price.¹¹

¹ Ante, § 80, and refs. 13 Barb. 645. 21 id. 82. 6 Ind. 26. 7 Wis. 508. 15 Cal. 213. 29 id. 589. 41 Ill. 193. 42 id. 78. 24 Ind. 332. 25 id. 128.

² 1 Keyes, 432. 3 id. 472. Supra, § 80. Infra, § 247. See 29 Cal. 589.

³ 2 Story on Con. § 814. 23 Wend. 611.

⁴ 43 N. H. 580.

⁵ 30 Ill. 164.

⁶ 2 Kent, 545. 2 Story on Con. 818. 7 T. R. 436. 17 N. Y. 249. 27 Barb. 658. 38 id. 375. 6 Bosw. 76. 23 Cal. 508.

⁷ 13 Wis. 79.

⁸ 14 B. Mon. Ky. 324.

⁹ 24 N.-Y. 538.

¹⁰ 1 Iowa, 64.

¹¹ 2 Story on Con. § 815. 2 Kent. Com. 541.

§ 236. Goods are considered to be on their passage when they are in the hands of a middleman, as a packer, or a warehouseman at any stage of their transit, although it may be at the place where they were directed to be sent, if that be an intermediate point between the place of sale and their ultimate destination.¹ They may also be reclaimed if they have actually reached their place of destination, if the carrier still retains them upon his lien for the freight.²

§ 237. Subject to the right of stoppage *in transitu*, goods sold and delivered to a carrier appointed by the vendee, are regarded as delivered to the vendee himself, on the principle that the acts of an agent are the acts of his principal.³ This right of stoppage prevails over any lien on the goods claimed by third persons through the purchaser, or an execution or attachment levied thereon by a creditor of a purchaser.⁴

§ 238. Where one has fraudulently obtained goods from another, the vendor may, if he choose, waive the fraud and affirm the contract and bring his action against the purchaser for the goods.⁵ But if he brings his action for the price he affirms the sale and cannot afterward reclaim the goods.⁶ So, if one wrongfully take goods, and then promises the owner to pay him for them, he may bring an action upon the contract and recover the value of the goods.⁷

§ 239. In executory contracts for the sale of goods, the vendor should not bring his action until he has performed or offered to perform all the parts of the contract to be performed on his part.⁸ Thus, on a contract to deliver 100 sacks of flour at a certain price per sack, or 100 bags of hops, at a certain time, at a certain price per cwt., no action lies until the delivery of the whole.⁹ So, in a contract to sell 100 tons of hay, to be paid for by the ton, part in advance and the residue when the whole was delivered, it was held that the delivery of the whole quantity was a condition precedent, and the plaintiff could not recover for a portion of the 100 tons which he had delivered.¹⁰ In another case, where the contract specified the quantity to be delivered, the time of delivery and price, and the vendee had consented to a variation in the time of delivery and price, but not in the quantity, and the vendor failed in delivering the quantity, it was held that an action

¹ 23 Wend. 611. 5 Denio, 629. 6 Barn. & Cress. 422. 6 Iowa, 480.

² 1 Barn. & C. 181.

³ 3 Bos. & Pul. 584. 8 T. R. 330.

⁴ 23 Cal. 508.

⁵ 4 Paige, 537. 34 Barb. 84.

⁶ 4 Paige, 537. 18 N. Y. 552. 29 Barb. 315.

⁷ 1 Marsh. Ky. 83.

⁸ 5 Duer, 336. *Infra*, § 249.

⁹ 5 Bos. & Pul. 61. 2 Stark. 251. 43 Mo. 123.

¹⁰ 18 Wend. 187.

would not lie for the portion delivered.¹ If the transaction is merely colorable, it being the intention and understanding of the parties that the goods shall not be delivered, but that the difference between the contract price, and the market price on the agreed day of delivery, shall be paid by one party to the other, the transaction is void under the 8th section of the New York statute against "Betting and Gaming."²

§ 240. An action on contract for the sale of goods will not lie until the credit upon the sale has expired, unless where the purchaser has procured the credit by fraud; as if he grossly misrepresents his circumstances, or purchase with a view to run away, or practice any deceit in obtaining the credit, manifesting an intention to cheat the seller out of his goods. In such cases the credit is void, and the price due immediately.³

§ 241. Where goods are sold to be paid for at the end of three months by the purchaser's note, or other security, at two months from that date, the contract contemplates a credit of five months, and at the end of three months the vendee's only damages would be for the non-performance of the contract to furnish the note or security.⁴ But after the five months, an action for goods sold and delivered lies;⁵ so, if the bill agreed to be given is drawn, but the drawee refuses to accept, an action for goods sold, etc., lies immediately.⁶ So, if goods are sold to be paid for in an approved endorsed note at six months, on the goods being delivered and the note demanded and refused, an action can at once be brought for the price of the goods. In Iowa it is held that where it is the vendee's own note, on time, that is to be given, his failure to execute and deliver it does not make him liable to pay before the day fixed, although it is otherwise in regard to the note of a third person.⁷ In Indiana, however, it is held that where the agreement is to give and receive the vendee's note, it must be executed in a reasonable time, or the whole sum becomes due immediately.⁸

§ 242. An action for goods sold and delivered may be maintained for goods sold to any duly authorized agent of the plaintiff, or to one whose acts, as agent, have been subsequently ratified.¹⁰ The

¹ 16 Wend. 632.

² 1 R. S. 662. 2 id. (Banks' 5th ed.) 924

§ 8. 1 Bosw. 207.

³ 1 Esp. 430. 2 id. 523. 27 Barb. 652.

34 id. 84. 10 Ind. 430.

⁴ 4 East. 147. 3 Bos. & Pul. 582. 21 Wend. 90. Id. 175.

⁵ 4 Bos. & Pul. 330.

⁶ 6 T. R. 52. 7 id. 60. 4 East. 153.

⁷ 2 Hall, 345.

⁸ 4 Greene, 539.

⁹ 14 Ind. 341.

¹⁰ 10 Wend. 271. 4 E. D. Smith, 337. 1 Met. Ky. 123. 16 Ill. 397. 18 id. 294. 20 id. 191. Id. 650. 14 Wis. 101.

authority of the agent may be directly conferred; or may be implied from the acts of the parties, as has been remarked.¹ Thus, where one has been accustomed to permit his wife, or child, or servant, to purchase goods on his account, all purchases so made will be deemed authorized, and he will be bound to pay for them. If goods are delivered to a carrier to transport to the consignee who is also the purchaser, by the purchaser's order, this is not such a delivery as makes the purchaser liable for them, if they do not correspond in quantity and quality with the order; but if the purchaser accepts them he is bound.²

§ 243. There is a class of cases where, although there is no actual agency, yet from the necessity of the case and the duty of the principal, the law renders him liable for goods purchased on his account. Thus, a husband is bound to provide for the support of his wife, a father for the support and education of his child, and a master for the support of his indented apprentice. In these cases, where the husband, parent, or master neglects to furnish them *necessaries*, any person who supplies them with them may maintain an action for the value.³ But the claimant must make proof of this neglect, to entitle him to recover.⁴ In the case of a father, however, his liability may, in special cases, be removed, and cast on another person, as when, in a decree for divorce, the care and custody of the child is absolutely, or by necessary implication, placed on the mother.⁵ And the obligation to provide for his children extends to all persons to whom he stands in place of a parent; as where he receives into his family his wife's children by a former husband. Although not bound to maintain them, yet if he does actually bring them into his family, he has placed himself in the place of their natural parent, and is liable for their maintenance and education the same as for that of his own children.⁶ And in these cases, he is liable for their necessities and education while living in a state of separation from him, rendering it proper that they should be furnished with them.⁷ If the necessities are furnished to an indented apprentice, strict proof of his apprenticeship is required.⁸

§ 244. The action may be brought for necessities or education

¹ Ante, § 158.

² 17 Wis. 37.

³ 1 Pars. on Con. 247, 289, 533. 41 Barb. 558. 9 Bosw. 578. 3 Hurl. & N. 261. 12 Iowa, 512.

⁴ 24 Barb. 634. 29 id. 128, 129. 1 Hilton, 108.

⁵ Pars. on Con. 255. 29 Barb. 124. 9 Bosw. 578. 25 Ill. 503.

⁶ 4 East. 76. 3 Esp. 1.

⁷ 3 Esp. 1.

⁸ 3 Esp. 188.

furnished a bastard child, where the putative father, after their delivery, has promised to pay for them, notwithstanding he has since the promise discovered that the child was not his.¹

§ 245. Where goods are sold to a committee of a club, party, or society, for the society, the vendor is not bound to look to the other members for his payment, but may recover in an action against them alone.²

§ 246. When goods are sold to be paid for in labor by the purchaser, an action will not lie for them so long as he does not make default in his contract to pay for them. The same rule applies in all other cases where there is an agreement for payment otherwise than in money.³ There must be a demand to put the purchaser in fault.⁴

§ 247. Where I sell goods for a note of a third person, which the purchaser, knowing that the maker was insolvent, fraudulently passes to me to be collected at my risk, I may return the note and avoid the sale for the fraud, and bring my action for the goods as wrongfully detained from me, or for their conversion by the defendant.⁵ It is sufficient if the note is returned on the trial, or, if it is the vendee's note, that it is produced and canceled on the argument of the case on appeal, and this even if the note has been for a time out of the vendor's hands, provided he has the possession and owns it when he produces or cancels it.⁶ But I cannot maintain an action on the contract for the goods sold; for if I affirm the contract of sale, I have received the price for them in the note.⁷ So where one falsely represents the vendee to be of ability to pay, upon which I trust him with goods, my action against the person fraudulently recommending him is not for the sale of the goods, but for the deceit.⁸

§ 248. The action, however, was maintained where a father fraudulently represented to the vendor that he was about relinquishing business in favor of his son, and the vendor thereupon sold goods upon credit to the son, it appearing that the father dealt with the proceeds.⁹

§ 249. If I order a tradesman to send me, on credit, a certain

¹ 1 Peake, N. P. 29.

⁶ 18 N. Y. 295. 23 id. 264. 32 Barb.

² 2 Com. on Con. 356. 1 Bro. Ch. Cas. 171. 38 id. 375. 42 id. 554. 15 Cal. 213 101.

29 id. 589. Supra, § 233.

³ 13 John. 56. 18 id. 169. 3 Com. 88. ⁷ 18 N. Y. 552. 4 Paige, 537. 3 Camp. 15 Ark. 378. 5 Wis. 400. 16 id. 87. 30 352.

Ala. 68. 28 Ill. 493.

⁸ 1 Camp. 4.

⁴ 16 Wis. 87.

⁹ 1 Stark. 17.

⁵ 4 Paige, 537. 32 Barb. 171. 29 Cal. 589.

quantity of goods, and he sends me a less quantity and upon a shorter credit, the sale is not perfect unless I receive the goods upon his terms, and I am not liable to pay for them if they should be lost on their way to me. The same rule applies where more goods are sent than ordered, or by a different conveyance.¹ If, however, I accept them, I am obliged to pay for them.²

§ 250. Where I leave with you and another person a carriage to be sold, and the proceeds to be applied to pay debts due to you and to him, instead of selling it you keep it a year, use it as your own, get it repaired on your own account, the other creditor refusing to join in the repairs, and offer repeatedly to sell it, in an action against you by the other creditor for his debt, he can recover on the ground that you have become the purchaser of the carriage, because you might and should have sold it within the time.³

§ 251. WARRANTIES made upon the sale of chattels, are, with the following exceptions, express, and not implied contracts, and must be made at the time of the sale, or prospectively in view of it.⁴ 1. The vendor, without any special contract, warrants his title to the goods sold, *if they are in his possession*; otherwise not.⁵ In sales by pawnbrokers, sheriffs on executions, or executors, administrators, or trustees, or in other cases where the vendors do not profess to sell the goods as their own, but as those of another person, they do not warrant their title longer than the purchase money remains in their hands or under their control.⁶ The vendor warrants the genuineness of a promissory note sold by him.⁷ If it is a patented article that is sold, there is a further implied warranty of the right to use it.⁸ A pledgor warrants his title to the property pledged.⁹ 2. A dealer in articles to be consumed by his customers, warrants that they are sound and wholesome;¹⁰ but not if the sale is as merchandise, and not for immediate consumption by the purchaser.¹¹ An English case holds that this

¹ 3 John. 534. 5 Wend. 253. 2 Hill, Ind. 365. 7 Minn. 414. 2 Com. on Con. 137. 6 id. 208. 1 Allen, 160. 18 Wis. 263. 24 Cal. 458. 31 Ill. 107. 32 id. 411. 262. 43 Mo. 123. Supra, § 239.

² 9 Barn. & C. 386. 1 Camp. 53. 5 ⁷ Story on Prom. Notes, § 118. 15 John. Wend. 253. 6 Hill, 208. 18 Wis. 262. 240. 3 Allen, 258. See 19 Wend. 557.

³ 16 John. 225.

Infra, § 398. 21 Ind. 411.

⁴ 2 Story on Con. § 827. 26 Eng. L. & E. 254. 11 Wend. 584. ⁵ 25 How. Pr. R. 440. See 32 Wis. 74. ⁶ 30 Cal. 372.

⁷ 2 Story on Con. § 833. 1 John. 274. ⁸ 12 John. 468. 18 Wend. 449. 50 Barb. 6 id. 5. 20 id. 196. 3 Cowen, 272. 26 N. 116. 18 Mich. 51.

Y. 224. 39 id. 220. 40 id. 283. 6 Transcript, 132. 39 Barb. 273. 20 Mis. (5 Bennett) 229. 2 Sneed, 192. 1 Head, 506. 17 ¹¹ 5 Denio, 617. 1 id. 378. 2 E. D. Smith, 234. 3 id. 324. 2 Story on Con. § 838. 18 Mich. 51.

warranty applies only to provisions sold by general dealers who are in the trade, as victualers, taverners, butchers, and the like, and not to others.¹ There is no implied warranty of soundness of cattle brought to a market by a drover, and sold to a butcher to be slaughtered.²

3. One who contracts to make and deliver an article, warrants that it will be of good quality for the purpose intended.³ If, however, the maker is directed and controlled in its manufacture by the one ordering it, then there is no such warranty. In such a case the manufacturer is only bound to use diligence and skill; he does not warrant the result any further than these are concerned.⁴ 4. Where goods are sold by sample, a warranty is implied that the bulk of the goods is equal to the sample.⁵ It must, however, appear that the sample was shown and the sale was intended by the parties as a sale by sample.⁶ 5. Where goods are ordered of a certain character, or where goods of a certain described quality are offered for sale, and are purchased without an opportunity for the purchaser to examine them.⁷

§ 252. It is unnecessary to use the word "warrant," for no particular form of words is necessary to constitute a valid warranty. Any positive affirmation respecting the thing to be sold, which the purchaser may rely upon as a fact, and not the expression of an opinion, is sufficient;⁸ as if in a negotiation for the sale of a horse, I say "I promise you he is sound," or "you may depend upon it, the horse is perfectly quiet, and free from vice," or that the horse "was not lame, and that he would not be afraid to warrant that she was sound every way, as far as he knew;" or "well, the cow is all right;" or that a jack "is a good and sure foal-getter."⁹ If a horse is purchased to use in harness, and the vendor says he is "all right," this is a warranty of his soundness, and of his fitness for use in harness.¹⁰

¹ 16 Mees. & Wels. 644.

² 3 E. D. Smith, 324.

³ 23 Wend. 350. 3 E. D. Smith, 58. Id. 375. 12 Ind. 46. 11 Ohio, N. S. 48. 12 Wis. 276. 2 Story on Con. § 836. 32 Ill. 252.

⁴ 3 Nevada, 141.

⁵ 6 Cowen, 354. 9 Wend. 20. 18 id. 425. 9 Ind. 572.

⁶ 18 Wend. 425. 19 id. 159. 1 Seld. 73. Id. 195. 2 Story on Con. § 835. Infra, § 259.

⁷ 2 Kent's Com. 479. 2 Story on Con. § 834. 17 Wend. 277. 23 id. 350. 34

Barb. 204. 1 Bosw. 480. 2 Hilton, 137. 4 Camp. 144. 2 Head. 445.

⁸ 2 Story on Con. § 828. 1 Pars. on do. 463. 3 T. R. 57. 19 John. 290. 20 id. 203. 4 Cowen, 440. 22 Barb. 134. 24 id. 549. 26 id. 141. 44 id. 536. 53 id. 601. 1 Hilton, 266. 37 Penn. 147. 5 Cal. 471. 18 Wis. 196. 28 Ind. 125. 30 id. 214. 13 Minn. 109. 23 Iowa, 257. 45 Ill. 496.

⁹ 3 Man. & R. 2. 19 John. 290. 13 Wend. 277. 1 Met. Ky. 444. See also 6 Barb. 557. 12 id. 336. 4 E. D. Smith, 202. 26 Eng. L. & E. 254.

¹⁰ 13 Wis. 600.

If it should appear that he balked seven weeks after the sale, this is too remote from the sale to be a breach of the warranty,¹ but evidence that he was balky "a few days" after the sale, is evidence that he was balky at the sale.² If, however, the affirmation is qualified, as if I say, "the horse is sound as far as I know," or "I think him sound," it will be held a mere expression of opinion, unless it appear that I knew he was not sound, and in the latter case, the vendee might repudiate the sale on account of the fraud.³ In one case⁴ this distinction was not adverted to, and a statement by the vendor of the soundness of a horse, and that he was not afraid to warrant it "as far as he knew," was treated as simply that he was not afraid to warrant. Whether the affirmation was understood and intended by the parties as a warranty is a question of fact for the jury, or for the justice where there is no jury.⁵ The affirmation may be made at any time while the treaty for the sale is in progress, although the sale does not take place for some days, the general rule being that the warranty must be made at the time of the sale; but the negotiation may continue for several days, and the warranty may be made during the time, and prospectively in reference to the final completion of the sale.⁶ One made after the sale would be void, unless upon a new consideration, or upon one distinct from the sale, and then it would be valid.⁷ It may be that the article will continue sound for a year, or answer a particular purpose.⁸ It was held, in one case, that representations made a month before the sale were too remote to be binding.⁹ Any mere commendation, by the vendor, of the property he is selling, is not a warranty, unless the case shows that both parties understood it to be one.¹⁰

§ 253. A *general* warranty relates to the general character of the article warranted, as that a horse is free from disease, or free from vice. In case of such a warranty, although it may be in writing, if the article has any defect which is pointed out to the purchaser, or is

¹ 15 Wis. 550.

² 9 Minn. 194.

³ 1 Story on Con. §§ 506, 511, 828. 1 Pars. on Con. 462, &c. 2 Caines, 48. 4 John. 421. 5 id. 354. 4 Cowen, 440. 8 id. 25. 6 Barb. 557. 24 id. 540. 4 Car. & P. 45. 5 Man. & R. 124. 3 T. R. 57. 30 Mis. (9 Jones) 406. 37 Penn. 147.

⁴ 13 Wend. 277.

⁵ 2 Story on Con. § 828 b. 8 Cowen, 25. 10 Wend. 411. 13 id. 277. 19 Barb. 574.

22 id. 134. 1 Hilton, 266. 13 Wis. 600. 14 id. 258. 28 Ind. 125.

⁶ 2 Story on Con. § 827. 2 Ld. Ray. 1120. 11 Wend. 584. 18 Wis. 196.

⁷ 2 Story on Con. § 827. 2 Ld. Ray. 1120. 12 Wend. 446. 14 Wis. 258. 2 A. K. Marsh. 143. 2 Scammon, 22.

⁸ Doug. 735. 2 Story on Con. § 827.

⁹ 40 Maine, 9.

¹⁰ 45 Ill. 496.

plainly visible, the warranty will not extend to it.¹ If, therefore, a horse is lame, or diseased in his eyes, and the purchaser is informed of the fact, a warranty that he is sound will, in effect, only be that he is sound excepting such defect. The purchaser in such cases if he wishes to guard against it, should require a *special* warranty which refers to a particular quality of the article; as that the lameness of the horse will not be permanent. But, it is to be noted here, if there is any question whether the defect was made known, or was obvious, that question is one of fact to be submitted to a jury.² And the vendor must not use any artifice, or say or do anything whatever to divert the eye, or obscure the observation of the buyer, or to otherwise mislead him, even in relation to open defects. If he does so, he is guilty of fraud.³ If the vendee is unable to discover the defects for want of skill, or of eyesight, a general warranty is sufficient.⁴

§ 254. Notwithstanding a sale may be made with a warranty, yet if there has been any willful misrepresentation, concealment, or fraud by the vendor, either as to the kind, soundness, quality, or other particular of the article sold, the vendee may disregard the warranty, and either return it and recover the price paid, or bring his action for his damages for the fraud.⁵ And it will not affect his right to show the fraud by parol evidence that the contract for sale was in writing, and silent as to the fraudulent inducements.⁶ Where there is no fraud, but a warranty only, the vendee cannot restore the goods, but is limited to his action on the warranty,⁷ except in case of executory sales.⁸ It is doubted in New York if a return can be made for a breach of warranty on sales by sample.⁹ In England it is held that it can be.

§ 255. No warranty is implied from the sale of an article under the name of another, differing from it in species, or from the description in a bill of parcels;¹⁰ as where *peachamwood*, of little value, was sold as *brazillette*, a more valuable article;¹¹ or *kelp* for *barilla*, which it somewhat resembles;¹² *scarlet cuttings* for what were not

¹ 2 Caines, 202. 2 Denio, 79. 34 Barb. 367. 24 Ala. 424. 27 Geo. 275. 2 Head. 314. 41 Vt. 631.

² 34 Barb. 367.

³ 3 Bl. Com. 165.

⁴ 2 Story on Con. § 830. 3 Bl. Com. 166. 34 Barb. 367 and refs.

⁵ 18 Wend. 462, 463. 2 Hill, 288. 4 id. 625. 4 Kern. 597. 7 Wis. 503. Story on Con. § 850. 13 Ohio, N. S. 502.

⁶ 3 Barn. & Cress. 623.

⁷ 2 Hill, 288. 4 id. 625. 4 Kern. 597. 6 Bosw. 148.

⁸ 23 Wend. 350. 1 Seld. 86.

⁹ 4 Kern. 597; but see 1 Seld. 98. 99.

¹⁰ 2 Barn. & Ad. 463. 1 Carr & K. 561. 2 id. 557.

¹¹ 2 Caines, 48.

¹² 20 John. 196.

scarlet cuttings;¹ an inferior stone for a *bezoar* stone;² or peppermint oil, described as pure, when in fact a portion was impure.³ In such cases the law requires the purchaser to attend when he makes his bargain, while the article is equally open to the inspection of both parties, and implies no warranty from the name applied to it. If, however, the vendor knew that the article was a different one from that for which he sold it, the purchase might be avoided by the buyer on the ground of the fraudulent representation.⁴

§ 256. In an ordinary sale of merchandise for the market price of a good article, where there is no express warranty, there is no implied warranty that the article is merchantable, although it may be utterly unfit for the purpose to which it is applied. This was held in a case where flour, made from grown wheat, which rendered it unfit for ordinary bread and to manufacture into starch, was sold.⁵ The doctrine has also been applied where white lead, adulterated with Spanish white, was sold at the full market price.⁶

[§ 256*a*.] Articles are sometimes purchased for a specific purpose, and this to the knowledge of the vendor; but a warranty of their fitness therefor cannot be implied from that knowledge alone.⁷

§ 257. A mere expression of an opinion in relation to the quantity, quality, or worth of an article sold does not amount to a warranty. Every person, in making a purchase, reposes at his peril in the opinion of others, where he has equal opportunity to form and exercise his own judgment.⁸ And where the goods are exposed to his inspection he must judge for himself; and if he place implicit confidence in the opinion of the seller, he does so at his own risk.⁹ The maxim, *caveat emptor*, let the purchaser beware, properly applies in such a case.

§ 258. Where one contracts for the sale and delivery of an article at a future day, and there is no selecting or setting it apart, as to furnish a quantity of wheat for a certain price, the merchantable

¹ 1 Stark, N. P. 410.

² Cro. Jac. 4.

³ 26 Barb. 141. See also 9 Met. 83. 3 Rawle, 23. 1 Seld. 82. 1 Pars. on Con. 463, and note o. 2 Kent's Com. 479. 17 Wend. 270.

⁴ 18 Wend. 462, 463. 21 N. Y. 552.

⁵ 18 Wend. 449.

⁶ 4 John. 421. See also as to the general rule. 4 Zab. 257. 15 Grat. 572. 1 Seld.

73. Id. 95. 21 N. Y. 552. 13 Ohio, N. S. 502.

⁷ 34 N. Y. 118. 34 Barb. 607. 6 Duer, 220. See 8 Wis. 352.

⁸ 5 John. 354. 6 Seld. 319. 19 N. Y. 499. 42 Barb. 470. 3 Buls. 95. Cro. Jac. 386. 12 Ill. 274. 39 Penn. 88. 13 Ohio, N. S. 502. 21 Ill. 247. 1 Iowa, 531. 30 Ind. 214.

⁹ 1 Rol. Ab. 101, pl. 16. 1 Sid. 146. 1 Lev. 102. 2 Ld. Ray. 1118. 1 Greenl. 389. 12 East. 632. 19 Wend. 159.

quality of it is implied.¹ So, where a contract is made with a mechanic to make and furnish an article in his line of business, an obligation is implied to make it in a skillful and workmanlike manner, of good material, and that there is no latent defect in its manufacture.² Here the purchaser, when making his contract, cannot inspect the article, and must rely upon the honesty of the seller; and this furnishes the reason for a rule different from the one where the contract of sale is not an executory one. But where the vendor agreed to sell and deliver his growing crop of corn on a certain piece of land, to be delivered "in merchantable order," it was held that he was obliged only to deliver all the merchantable corn that grew on that land.³ And a contract, at a price certain, for all the wheat one raises on his farm, does not raise any implied warranty, either as to the quantity or quality of the grain.⁴ In all these cases of implied warranty on executory sales, as well as where the contract expressly provides that the article sold shall be of merchantable quality, if an inferior one be delivered and accepted, the purchaser is not entitled to a reduction from the contract price. He should refuse to accept it, or if he has received it without discovering its quality, return it to the vendor as soon as he ascertained it.⁵ This class of cases are not strictly warranties, but contracts to which these peculiar provisions are incident.⁶

§ 259. Where a sale is made by a sample, in order to raise an implied warranty that the bulk of the article is of a quality equal to the sample, it is necessary to show by the circumstances of the case that the sale was intended by the parties to be by the sample. It is not enough that a sample drawn from the bulk is shown, for the purchaser in that case purchases at his peril.⁷ This was held where the plaintiff agreed to purchase fifty bales of cotton at a price "if the cotton was equal to the samples exhibited." The court held that the question was properly left to the jury, whether the purchase

¹ 2 Hill, 137. 4 Comstock, 122. 34 Barb. 204. 38 id. 215. 41 id. 454. 1 Bosw. 480. 18 Ill. 420. 22 id. 288. 5 Cal. 471. 20 Wend. 61. 23 id. 350. 21 N. Y. 552. 3 E. D. Smith, 375. 1 Wis. 420. 3 id. 347. 12 id. 276. 16 Ill. 69. 19 id. 565. 12 Ind. 46. 11 Ohio, N. S. 48. 31 Miss. 91.

² 34 Barb. 204.

³ 14 Ind. 158. See also 29 N. Y. 358. 7 Abbott, 462.

⁴ 2 Kent, 480, and refs. 20 How. U. S. 149. 2 John. Cas. 253. 13 John. 219. 18 Wend. 462. 23 id. 352. 2 Hill, 288. 4 Comstock, 122. 1 Seld. 86. 29 N. Y. 358. 43 Barb. 40. 51 id. 252. 53 id. 132. 4 E. D. Smith, 202. 20 Ill. 285.

⁵ See 4 Comstock, 125.

⁷ 18 Wend. 425. 1 Seld. 75. Id. 95. 4 Duer, 69. Supra, § 251. 45 Ill. 496.

was intended to be by the sample.¹ The fact that the article is in bales, as hemp or cotton, so as to render it inconvenient to examine it, does not warrant a disregard by the purchaser of the rule, *caveat emptor*. There must be an inability to make the inspection from lack of opportunity.² If damaged goods are sold by sample, the sample shown should be a fair specimen of the whole, of the bad as well as the good;³ and where goods are sold by sample, the articles must correspond with it, or they may be rejected.⁴

§ 260. Where an article has been sold with warranty whether express or implied, and whether by sample or otherwise, upon its breach an action for damages may be brought without offering to return the article or giving notice of the defect. And the purchaser may recover his damages although he sells the article.⁵ And this although no claim has been made upon him, and even where he is not liable to any one on account of the alleged defect.⁶ The warranty does not of itself authorize him, on discovering that the article does not correspond to it, to repudiate the contract of sale and return the article and recover its price, even if he wishes to. To entitle the vendee to do this, there must be either an agreement to that effect, or fraud on the part of the vendor.⁷ And the return should (except in some exceptional cases) be made promptly.⁸ If several articles are sold at the same time, at separate prices for each, if one is defective, it may be returned in a proper case without returning all the rest.⁹ The measure of these damages is the difference between the actual value, and what its value would have been if it conformed to the warranty.¹⁰ The price paid does not determine the damages. For I may have purchased, at fifty cents, an article warranted perfect, and the value of which, if perfect, would have been one dollar, and after the purchase, by reason of a defect, the article is worth only seventy-five cents. Here, notwithstanding the article is worth more than I paid for it, it is clear that I have lost twenty-five cents by reason of its not conforming to the warranty, and this is the true measure of my

¹ 18 Wend. 425.

² 17 Wend. 275. 19 id. 159. 1 Seld. 73.

³ 19 Barb. 574. 45 Ill. 496.

⁴ 9 Ind. 572. 45 Ill. 496. See 4 Kern. 497.

⁵ 1 H. Bl. 17. 12 Wend. 566. 18 id. 425. 4 Kern. 597.

⁶ 4 Kern. 597. 2 Hilton, 137.

⁷ 2 Hill, 288. 4 id. 625. 4 Kern. 597.

6 Bosw. 148. 17 Ind. 612. See 22 id. 51.

Infra, § 261.

⁸ 1 Denio, 69. 6 Ind. 26. 14 id. 49. 20 Ill. 285, 35 id. 102. 7 Wis. 503.

⁹ 3 E. D. Smith, 218.

¹⁰ 2 Hill, 288. 4 id. 625. 1 Comstock, 312. 4 Kern. 597. 17 Barb. 518. 28 id. 462. 6 Bosw. 148. 2 Hilton, 53. 20 Ill. 180. Id. 184. 32 id. 146. 34 id. 607. 32 id. 146. 11 Iowa, 258. 27 Ind. 27. 29 id. 142.

damages.¹ Where cabbage seed, warranted to be of a certain variety, proved otherwise, it was held that the damages were the value of such a crop of the variety warranted, as would have been ordinarily produced that year, deducting the expense of raising it, and the value of the crop actually raised.² And where goods were sold by sample, and were not such as warranted, the vendee having sold them, he was allowed as damages the difference between the re-sale and their value if of the quality represented.³ Where a warranted horse was returned because unsound, it was held that the price paid afforded the rule of damages, in an action on the warranty.⁴ If diseased cattle are sold as healthy, then also any other immediate injury, resulting from the breach of warranty, as expenses, may be recovered for.⁵

§ 261. Cases frequently arise, however, as was said in the last section, where a warranty is accompanied with a contract authorizing a return of the article if it is not what it is warranted to be. As where the terms are "I warrant the horse to be sound, and if he is not you may return him." Here the purchaser may cancel the contract of sale if the horse is not sound, and the general rules governing contracts apply.⁶

§ 262. In an action by the vendor for the price of a warranted article, the vendee may, in his defense, show the warranty and its breach, and his damages thereon in reduction of the contract price, although he has made no offer to return it, or to cancel the sale.⁷ So, where one gives three promissory notes for the price of goods warranted to him, and he has paid two of them, he may give in evidence a breach of warranty in respect to a part of the goods in defense of the third note.⁸ In an action against the vendor, he may recover his damages for breach of warranty after payment of the notes, although before he paid them he had discovered the breach, if he had not at the time ascertained the extent of his damage.⁹

§ 263. If the contract for the sale be in writing, no warranty can be shown except such as is expressed in it or necessarily implied from it.¹⁰ And no oral agreement at the time, in such a case, to warrant

¹ 4 Hill, 627. See 24 Barb. 549.

² 34 N. Y. 634. 1 Ellis. B. & E. 84.

³ 28 Barb. 462. See 7 C. B. N. S. 145.
6 Hurl. & N. 512. 27 Ind. 27.

⁴ 20 Ill. 343.

⁵ 21 Ill. 180.

⁶ See 10 Cush. 88.

⁷ 4 Wend. 483. 8 id. 109. 3 Hill, 171.
5 id. 63. 4 Kern. 602. 4 E. D. Smith,

202 and refs. 2 Hilton, 132. 1 Iowa, 531.

21 Ill. 180. 6 Ind. 26. 4 Cal. 345. 12

Wis. 276. So in case of fraud. 21 Mis.
6 Ben. 415.

⁸ 10 Wend. 512. 11 Ind. 112.

⁹ 12 Wend. 566.

¹⁰ 1 John. 414. Id. 503. 3 Wend. 459
21 Mis. 6 Bennett, 338. 2 Head. 526. 4
Taunt. 779.

the article can be given in evidence, for the reason that the writing is a higher species of evidence, and when parties reduce their contract to writing, it is held to embody all of its provisions.¹ Where, however, the writing is simply a receipt of payment of the purchase price, and not a bill of sale or other evidence of the contract itself, parol evidence of a warranty may be given.² If, on the other hand, a written warranty is given, it may be shown by parol that there were visible defects in the article of which the vendee was apprised at the time of his purchase.³

§ 264. Actions for breach of WARRANTY, or for FRAUD IN THE SALE OF A HORSE, are of very frequent occurrence in justices' courts. The former are brought upon the contract and the latter not; yet as the facts which appear in the trials of both classes of actions are of a similar nature, an enumeration of the rules derived from the cases (some of which are sustained by cases not arising on the sale of horses, but of other property as to which the same rule applies) is here given:

1. In order to recover against the vendor in an action for the unsoundness or vice of a horse purchased of him, there must be shown either a warranty against it, or a fraudulent concealment of the fact, or a misrepresentation by the vendor.⁴ A sound price is no warranty.⁵ The warranty must be made before or at the time of the sale. One made after is void for want of consideration,⁶ unless made upon a new consideration, in which case it is valid.⁷

2. If a horse have a secret malady, unknown at the time to the vendor, and there be no warranty, the vendor is not liable. And the same rule applies if the vendor gives an erroneous opinion in regard to it.⁸ But if one, without knowledge of its truth or falsity, makes a material misrepresentation, he is as guilty of fraud as if he knew its untruth.⁹

3. If any deceit is practiced by the seller, either by misrepresentation or willful concealment, the purchaser may retain the horse and bring his action for the damages he has sustained in consequence of the fraud, or he may, on discovering the deceit, return the horse and recover the price paid.¹⁰ If he returns it, it must be returned within

¹ See *infra*, §§ 1420, 1421. 24 N. Y. 338.

² 24 N. Y. 338. 4 Mees. & Wels. 140.

1 Foster, 224.

³ 2 Caines, 202.

⁴ 1 Doug. 18. 2 East. 314. 22 Barb. 652.

⁵ *Supra*, § 256.

⁶ 5 Har. Del. 233.

⁷ 14 Wis. 258. *Supra*, § 252.

⁸ 2 Bosw. 75.

⁹ 1 Story Eq. § 193. 21 N. Y. 238. 36

Barb. 378. 29 Ala. 346. 35 id. 252.

¹⁰ 1 Car. & Payne, 23. 7 Wis 503.

a reasonable time after the discovery, and in the same state as when sold.¹

4. There may be a warranty and also a fraud in the same sale. In such cases the purchaser may rely upon the one or the other. He may sue upon the warranty, or return the horse for the fraud, and recover back the money paid, or may retain the horse and bring his action for his damages.²

5. There may be a warranty, and also a provision in the contract of sale authorizing a return of the horse if he were not what he was warranted to be. In this case the purchaser may rely upon either. If he wishes to rescind he must return the property or offer to, or give notice of his intention to rescind. Such an agreement, though said to be unusual, is not illegal.³ Where on the sale of a horse it was agreed that "should the beast prove unsound, a deduction to be made by two persons," it was held this precluded either from demanding a return of the horse.⁴

6. Any *assertion* or affirmation in relation to the soundness, condition, age, habits or freedom from vice of a horse, made during the negotiation of the contract of sale, or in contemplation of it, and as an inducement to it, is a warranty. An expression of an *opinion* as to his qualities is however not a warranty.⁵ It is for the jury to say whether the vendor did warrant or not, and this is to be determined by the language used.⁶

7. A general warranty does not cover any particular defect, which at the time of the sale is manifest, or which is pointed out to the purchaser, but is construed to except all such defects.⁷ But these defects must be such as could be discovered by an ordinary observer, and do not require skill to detect them; and this is a question of fact for the jury, or the justice when the trial is before him alone.⁸

8. A vicious habit in a horse is not an unsoundness, as a habit of *crib-biting*, or being a *roarer*, where it is not shown to be symptomatic of disease or infirmity.⁹

9. To comply with a warranty or a representation that a horse is sound, he must be at the time in good health and free from infirmity.¹⁰

¹ 2 H. Black. 573. 3 Esp. 83. 7 Wis. 503. Supra, § 260. 32 Vt. 1. 2 T. R. 745. * 13 Wis. 600. 22 Barb. 134. 4 E. D. Smith, 205.

² 4 Kern. 597. 6 Bosw. 148.

³ 5 Dutch. 371. 18 Md. 242.

⁴ 17 Ind. 612.

⁵ 4 Cowen, 442. 22 Barb. 134. 24 id.

549. 4 E. D. Smith, 202. 5 Cal. 471. 12 Ind. 118. 20 John. 208.

⁷ 7 Bing. 603. 8 id. 454. 34 Vt. 604. 34 Barb. 367. 2 Gaines, 202. 5 Moore & P. 606. 1 Moore & S. 622.

⁸ 34 Barb. 367.

⁹ 2 Camp. 523. 1 Holt's N. P. 630.

¹⁰ 13 Wis. 673. 1 H. Bl. 17.

If he have a permanent cough,¹ or is lame, though temporarily only;² or if he have been *nerved* (by dividing one of the nerves leading from the foot to the leg, to relieve a horse from the pain of a disease in the foot),³ or has the seeds of the glanders, which afterward develop into the perfect disease;⁴ or have any other organic defect, he is unsound. Some of the cases further hold, and such is doubtless the rule, that temporary coughs, or other diseases or injuries, are also unsoundnesses.⁵ So, a latent defect, which renders a horse less fit for present use and convenience, and can only be discovered by persons skilled in horses, is a breach of a warranty.⁶ One case lays down the rule that the question was, whether there was a disease existing of a vital organ, in a forward state; and that a disease of any sort, easily removed, but by neglect or maltreatment allowed to prove fatal, should not be accounted an unsoundness.⁷ But this is hardly sustainable within the principle of other decisions.

§ 265. Where the plaintiff brought his action to recover the price of a horse sold under the following warranty, viz.: "To be sold, a black gelding, five years old; has been constantly driven in the plow; warranted;" it was held that the warranty applied to soundness only.⁸ Where a horse was warranted "a thorough-broke horse for a gig," and the purchaser had no opportunity of using him in a gig for two months, but other persons had done so, and he had always answered the warranty, but after that the purchaser himself drove him, when he kicked and broke the gig, but it appeared that he was an unskillful driver; it was held that the horse answered the warranty at the time he was sold, and his bad demeanor was owing to unskillful driving.⁹ Where the warranty was, "sound in the eye, except a slight snap which will be well in a few days," the exception was held to be a material portion of the warranty.¹⁰

§ 266. Where the evidence of a warranty was a letter from the purchaser to the vendor, in which he wrote, "you will remember that you represented the horse to me as a five year old, etc.," to which the vendor wrote back, "the horse is as I represented it," it was held sufficient to justify a jury in finding a warranty at the time of the sale that the horse was five years old.¹¹ So, where on an

¹ 2 Chitty R. 425.

² 4 Camp. 281.

³ Ry. & Moody, 290.

⁴ 10 Cush. 520.

⁵ 9 Moore, 356. 1 Stark. 102. 5 Jones, Law, 137.

⁶ 5 Harring, 233.

⁷ 9 Rich. Law, 276.

⁸ 8 Moore, 338. See also 1 Moore & Scott, 74. 8 Bing. 48. 5 Car. & P. 78. 5 Moore & P. 534. 7 Bing. 574

⁹ 5 Dow. 59.

¹⁰ 2 Smith, 394.

¹¹ 2 Car. & P. 211.

exchange of horses, A asked B what was the matter with his horse, and B answered, "the horse has the distemper a little," it was held that this was, in effect, a warranty that it was not otherwise diseased.¹ Again, where a horse was purchased, to the vendor's knowledge, to be used in harness, and he said he was "all right," this was held a warranty of soundness and fitness for use in harness.²

§ 267. Where, instead of paying the money for a horse, the purchaser pays in some other chattel, if the vendor has been guilty of fraud in the sale, the purchaser may return the horse and bring his action for the chattel given for it. If, however, he received in the trade some other article with the horse, he must return, or offer to return, all that he received, before he can recover for the whole consideration. He may, however, without this, recover his damages for the deceit.³ If the vendor has made an assignment for the benefit of his creditors, the return, or offer to return, must be made to the assignee.⁴

§ 268. If the vendor uses any artifice to conceal unsoundness or other faults, he is guilty of a fraud.⁵ Therefore where the vendor of a horse knowing that he was subject to blindness, which was temporarily relieved by the use of remedies, while exposing him to sale observed that "his eyes looked dull but this was occasioned by having traveled over dusty roads," and refused to warrant him, but soon after the sale, on the purchaser riding him, he became totally blind, it was held that the vendor was guilty of fraud in not disclosing what he knew of the condition of the horse.⁶ This rule, however, must not be understood as going further than to condemn the use of artifice, for it is well settled that the vendor is not obliged to point out the defects in the property, unless he is questioned relative thereto. The maxim is, let the purchaser, not the vendor, beware.⁷

§ 269. Where one sells an article "with all its faults," the meaning of the contract is that the purchaser shall rely upon his own examination. The vendor must not, however, in such a case undertake to conceal any defect, for if he does he will, notwithstanding the provision, be guilty of deceit, and thus render the sale void, at the

¹ 4 Ind. 637.

² 13 Wis. 600.

³ 4 Mass. 502.

⁴ 32 Barb. 171.

⁵ 4 Taunt. 784, per Heath, J.

⁶ 4 Hall's Law Journ. 618, quoted at length in 2d and 3d eds. of this Treatise.

⁷ 4 Kent. 478. 1 Seld. 82 and refs. 4 Zabris. 257.

option of the purchaser.¹ Within the same principle, it held that a stipulation, in a bill of sale, that the property is sold as unsound, excludes the idea of a warranty, but that such a stipulation will be of no avail where the seller has resorted to any contrivance to mislead the purchaser.²

§ 270. III. CONTRACTS FOR WORK, LABOR AND SERVICES. These may be under seal, in writing without seal, and oral. They are frequently for work and labor, and for materials furnished or used in the service, as where I employ a carpenter to build me a house, and to furnish a portion or all the materials. They are subject to all the general rules which govern contracts, in relation to the sufficiency, legality and morality of their consideration, and to the rights of the parties claiming under them. The contract may be express in all its parts, or it may be express only in relation to the manner the service is to be performed, leaving the time of performance and the price of the service to be implied. It may also be implied from the circumstances of the person for whom the service is performed and his obligation to have it performed; as where a physician attends one's child, who is taken suddenly ill and requires his service.

§ 271. Where there is an express contract for a particular amount and mode of payment, the party rendering the services must rely upon it.⁴ Where no mention is made of the price to be paid for the services, the implied agreement is that it should be what they are reasonably worth; where the time of payment is not expressed, the implied agreement is that it shall be when the service is performed. Thus, if I employ a man to build a house at a certain price, mentioning no time of payment, he will not be entitled to his payment until he has finished it.⁵ If I hire a laborer for one year at the rate of twelve dollars a month, without a special clause in the contract, he cannot recover his wages until the end of the year.⁶ If a person agrees to work for a month, and then, if the parties are suited, that he will work during the season, he must make his election at the end of the month, and if he remains, that is evidence of his having elected to stay, and he cannot be allowed to leave till the end of the season.⁷

§ 272. Where the agreement is simply to perform a particular piece of work, or to labor for a certain period, whether the price is

¹ Peake's N. P. 115. ⁴ Taunt. 779. ³ ⁴ 18 John. 169. 30 Barb. 430. 16 Ill. Camp. 154. Id. 505. ⁴ id. 779. ⁵ Barn. 151.

& Al. 240. 1 Peters. 40, &c.

² 2 Head, 526.

³ 4 E. D. Smith, 231.

⁵ 5 How. Pr. R. 288. See 29 Ill. 269.

⁶ 13 John. 53. See 16 N. Y. 255.

⁷ 23 Barb. 24.

or is not specified in it, the person employed acquires no right to any part of his compensation until he has fully performed his part of the contract. The contract is considered *entire*, and he cannot perform a part of it by doing a portion of the work, or working a portion of the period, and then breaking off without his employer's consent, without not only forfeiting all right to recover for what he has done, or the time he has labored, but also rendering himself liable in damages for breach of his contract.¹ Thus, where one agreed with the owner of a cotton factory to spin for him ten and a half months, to be paid three cents per run for the yarn he spun, and his employer was in the habit of crediting him on his books for the quantity spun, it was held that the contract was entire, and upon his leaving before the expiration of the term he could recover nothing for what he had actually spun.² M. agreed to work for P. for a year, and worked ten months and a half and left, refusing to work longer, but in two days returned and offered to fulfill his contract. It was held that having wantonly deserted P.'s service without his fault, he was guilty of violation of the contract, and P. was under no obligation to receive him again, or to pay him for his services for the six months and a half.³ The plaintiff agreed to log up, burn and clear fit for sowing, ten acres of land by the 20th of September, to be paid at the rate of eight dollars per acre. He performed part of the work and then quit it of his own accord, without fault of the other party. It was held that he could recover nothing.⁴ A party contracting to deliver a certain quantity of lumber on a certain day, at a certain price per foot, payable on the delivery of the whole, but who delivers only a part of the quantity on that day, cannot recover for the part delivered, though it be used by the vendee.⁵ A sailor hired for a voyage and took a promissory note for thirty guineas, provided he proceeded, continued and did his duty as second mate from Kingston to Liverpool, but died on the voyage. It was held that no action lay for what he had done.⁶ This case was, however, made to turn upon the fact that the duty to be performed as a condition precedent was to continue to Liverpool, and that the contract was in some respects an insurance. Where a sailor contracted for certain wages to serve

¹ 12 John. 165. 13 id. 94. 19 id. 337.
14 Wend. 257. 5 Denio, 406. 31 N. Y.
462. 36 id. 221. 1 Transcript, 331. 28
Barb. 24. 4 Duer, 38. 22 Ill. 429. 38 id.
65. 45 id. 193. 6 Wis. 120. 40 Barb. 541.
31 Cal. 233.

² 12 John. 165.

³ 8 Cowen. 63. See also 2 Stark, 251.

⁴ 13 John. 94. See also 3 Mass. 147. 19
John. 337.

⁵ 5 Denio, 406.

⁶ 6 Term R. 320.

the master of a ship, and not depart the ship without leave until the voyage be ended and the vessel discharged of her cargo, and after her arrival and being moored at the port of discharge, but before her cargo was discharged, he left her without leave; all his wages were forfeited, and he could recover nothing.¹ In a contract to repair a chandelier and make it complete for £10, no action lies for a partial repair, though beneficial to the owner.² So, where one contracted to cure a flock of sheep of the scab, he was not permitted to recover for his services in curing a part, the remainder not being cured.³ In cases, however, of the ordinary employment of a servant for a limited period, where a portion of the service is performed and the remainder prevented by the death or illness of the servant, and not by his willful default, the rule is relaxed, and it is held that a recovery may be had for the labor actually done under the contract at the rate specified therein; whether the employer can claim a reduction therefrom for the damages, if any, sustained by him in consequence of the servant not being able to complete the stipulated term of service, is not fully settled.⁴ It is held that the recovery in such a case cannot exceed the contract price, or the rate of it for the part of the service performed.⁵ Another class of cases is where performance is rendered impossible by act of law, in which a recovery is allowed for the work actually done, at the prices agreed on.⁶

§ 273. Where, however, the person contracting to do the service is an infant, and he performs a portion of it only, he may recover what is the reasonable value of the service performed without reference to the contract, for the reason that his contract is void at his election, and the law will imply a promise by the employer to pay what the services are worth, irrespective of the contract price. And no damages can be recouped against his claim for any loss to the employer by his leaving his service, for the reason that his contract was not binding upon him.⁷

§ 274. In contracts for work and labor between masters and servants, there may be misconduct on the part of either master or servant which will justify the other party in rescinding the contract.⁸ Thus if a master so maltreat his servant that he cannot safely remain in his employment, or as to indicate a willingness to be rid of him,

¹ 13 John. 390.

² 4 Man. & Ryl. 1. 9 Barn. & Cress. 92.

³ 6 Dowl. & Ryl. 3.

⁴ 20 N. Y. 197. 26 id. 279. 19 Barb. 341. 24 id. 174, 666. 32 id. 577.

⁵ 4 Ind. 79. 5 Mich. 449.

⁶ 4 Comstock, 411.

⁷ 3 Denio, 375.

⁸ 19 Cal. 291. 2 Stark. 227. 4 Nev. & M. 797. 3 Ad. & E. 171. 29 Barb. 160.

the servant may leave him and recover his wages for the time he has served. But the employment of harsh language alone is not sufficient to warrant him in leaving;¹ nor is his being called upon to do severe or unpleasant labor an excuse for his leaving his work.² So, if the servant is intoxicated, so as to be unfitted for the discharge of his duties, or otherwise conduct himself improperly, as if he assaults another of his employer's servants with intent to ravish her,³ or if he refuse to perform a reasonable command of his master, he may dismiss him, and the servant, although hired by the year, cannot recover for the time he has served.⁴ In one case the plaintiff was a farmer's servant, hired by the year; he was ordered by his master to go immediately with his horses about a mile, but as dinner was ready he refused to go until he had eaten it, and for this cause was dismissed before the end of the year. It was held that the master was warranted in turning him away, and not bound to pay him for the service he had already performed.⁵ And it seems that he may also recover damages which, in such cases, is the difference between the contract price and the price the employer was obliged to pay for other labor in the servant's place.⁶ Other cases of misconduct are where a clerk makes false entries and representations; or in good faith, and in a respectful manner, claims to be a partner; or a servant is guilty of moral misconduct, willful disobedience, or habitual neglect, in which, and all similar cases, the master or employer may dismiss him.⁷ If it is the agreement that the employee may leave in case of disagreement, a *bona fide* disagreement is all that is necessary to allow either party to put an end to the service.⁸ So, if it provides that either may terminate it at any time, the servant may quit at any time and recover on the contract for the work done.⁹ As to the rule in Iowa, see *Pixler v. Nichols*, 8 Iowa, 106. If the servant is wrongfully discharged, he may pursue one of three remedies: 1st. Immediately sue for his damages; or, 2d, sue on a *quantum meruit* for the work done; or, 3d, wait till the end of the term and claim as damages the wages agreed to be paid;¹⁰ unless it appears he has had or been offered similar employment in the vicinity from others, in which case a deduction of what he has or could have received is to

¹ 1 Wend. 514.

² 23 Ill. 429. †

³ 4 Car. & P. 208. 31 Mis. 585.

⁴ 2 Nev. & M. 829. 4 id. 797. 6 Car. & P. 15. 5 B. & Adol. 789. 3 Ad. & E. 171.

⁵ 2 Stark. 227.

⁶ See 8 Iowa, 106.

⁷ 4 Bing. N. C. 638. 6 Scott, 379. 9 Ad. & E. 548. 4 Car. & P. 518.

⁸ 29 Barb. 160.

⁹ 7 Wis. 404.

¹⁰ 31 Barb. 381.

be made.¹ If suit is brought for either of these causes of action, it is a bar to all subsequent suits growing out of the transaction.²

§ 275. Where the contract is not entire, as where one is employed to do certain work, and to be paid from time to time as it progresses, or to work for a year and to be paid monthly or quarter-yearly, and in all cases where, by the terms of the agreement, payment is to be made on partial performance, an action will lie for the money payable as fast as it becomes due by the terms of the contract. In such cases, however, the other party may show the damages which he has sustained in consequence of the non-performance of the residue of the contract, in diminution or extinguishment of the claim established against him. In technical language, he may *recoupe* his damages; and in New York and elsewhere, where there are similar codes, the defendant may have a judgment in his favor if his damages exceed the plaintiff's claim.³

§ 276. Where there is a special agreement for certain work, as to build or repair a house or ship, and the price and time of payment are fixed, if the parties by mutual consent change the plan, the terms of the contract, as far as they will apply, will regulate the price and time of payment of the new work.⁴ Where, however, the change is so great that the terms of the contract do not apply to the new work, the latter is considered as done under a new and distinct agreement, both as to price and time of payment; and as neither is fixed by its terms, the price will be what the service is reasonably worth, and the payment will be due as the service is performed.⁵ Thus, where one agreed to repair a vessel according to an estimate, to be paid £100 in two weeks, £100 in four weeks, £100 in six weeks, and the balance by an approved bill at six months, and worked upon the plan some time, when the parties deviated from it and completed it in a different manner, it was held that, as there was nothing in the original agreement to govern the new work according to the stipulation to pay each fortnight and the final sum by bill, he might sue immediately on the completion of the work, although the credit agreed on had not expired, "there being nothing in the original agreement to govern the new work according to the stipulations in that agreement, the time of payment could not be applica-

¹ 21 Wend. 457. 2 Denio, 609. 1 E. D. Smith, 70. 2 Hilton, 59. 2 Ell. & Blackb. 678.

² 31 Barb. 381.

³ N. Y. Code, §§ 150, 274. 2 E. D. Smith, 317.

⁴ 30 Barb. 430. 22 Ind. 238.

⁵ 29 N. Y. 375. 10 John. 36. 1 Stark. 220. S. C. 1 Holt, 236. 16 Wend. 586.

ble."¹ And where some additions are made to a building, by the employer's request or consent, beyond those required by the original contract by which the workman contracts to finish it for a certain sum of money, the contract shall exist as far as it can be traced to have been followed, and the excess only paid for according to the usual rates of charging;² and if a man contract to work by a certain plan, and that is so entirely abandoned that it is impossible to trace the contract and say to what part of the work it shall be applied, the workman is permitted to charge for the whole work done by measure and value, as if no express contract had been made.³

§ 277. The cases in the last section are where the deviation is with the employer's consent, or he accepts the work; and in such cases the same rules apply to other work as well as that done in altering or repairing buildings.⁴ And in all cases where delay is caused by the willful acts or omissions of the party for whom the work is done, with intent to embarrass the performance of the contract by the other party, who, notwithstanding, proceeds and bestows his time and labor in attempting to complete it, until in despair he finally abandons the work, the rule that the special contract must control the rate of compensation no longer prevails, and the party is entitled to the actual value of his services;⁵ or in such a case the contractor may bring his action for a breach of the agreement, and recover the profits he would have made; if he sues for work and labor, he cannot recover for profits, but for only what the work actually done is worth.⁶ Where there has been a deviation, and the work is accepted, it is held that the recovery cannot exceed the contract price, nor can the employee recover that if his work is worthless, or if, by paying the contract price, the rest of the work will cost more than the whole if completed according to contract. From the contract price, in such cases, should be deducted the amount necessary to complete the job.⁷

§ 278. If a builder contract to build a house of specified dimensions and with specific materials, and deviate from the specification, he cannot recover;⁸ but where one, not a builder, finishes work other than a building, differently from the specification, and the employer

¹ 1 Stark. 220. S. C. 1 Holt, 236.

² 31 N. Y. 462. 4 Comstock, 338. 16

³ 3 Ind. 59. 3 Iowa, 505. 32 Ill. 252. Wend. 586.

⁴ Peake, 108. 4 Wend. 289. 13 id. 276. ⁵ 4 Comstock, 338.

3 Iowa, 90.

⁶ 3 Ind. 59. Id. 72. Id. 148. 5 Mich.

⁷ 16 Wend. 586. 25 id. 665. 4 Cowen, 449.

564. 3 Ind. 59. Id. 72. 11 id. 84. 5 ⁸ 5 Seld. 93. 11 Wis. 107. Mich. 449.

accepts it, he may recover the contract price, deducting such a sum as it would require to complete it according to the specification. The reason of this distinction is, that in the latter case the work is accepted by the employer, while in the former it is not, although from necessity the house remains on his land, and he occupies it, and so derives some benefit from it. But as he agreed for a particular kind of building, it would be manifestly wrong to compel him to pay for a different one merely because it occupies his land. In the case of an article other than a building, he need not accept it; but if he chooses to receive it, reason and justice require that he should pay for it. In the case of a building, he is compelled against his will to take what he did not contract for and does not want, and it is equally just that he should not be compelled to pay for it. Accordingly, the mere occupation of a building, where there is a substantial failure to erect it according to contract, is not a waiver of strict performance (though it may be an evidence thereof); and the builder cannot recover anything, though the owner does occupy and enjoy the erection.¹ If occupancy and other evidence satisfy the jury that the owner was willing to accept it at what it was worth, then that amount, not exceeding the contract price, may be recovered by the builder.² If the variance is only in a delay in completing the building, and it is accepted, the owner may recover any damages he has sustained by the delay.³

§ 279. Where one has ordered a carriage or other chattel to be made for him by a mechanic, and it is made pursuant to the order, and on being tendered to him, he refuses to accept and pay for it, it may be left in charge of a third person with notice to the customer, and an action maintained for the price; or it may be sold for the best price it will bring, and an action be brought for the loss upon the sale.⁴

§ 280. Where the owner of a lot employed a mason to work for him on a building at stipulated prices, and after a portion of the work was done, upon the owner neglecting to furnish the necessary materials, the mason quit the job, it was held that he could only recover for the labor performed, at the contract price, in the absence of proof of circumstances to show greater damages; but that if by the neglect of the owner to furnish the materials, the contractor was compelled to do his work at a less favorable season, or at an increased

¹ 17 N. Y. 173. 11 Wis. 107.

⁴ 15 Wend. 493. 1 E. D. Smith, 590.

² 9 Ind. 497.

34 Barb. 301. 36 id. 354. 30 N. Y. 549.

³ 40 Barb. 175.

expense, such additional expense ought to be taken into consideration and added to the contract price.¹ So, if a person employs different parties by distinct contracts, to do the work, if either party delays another in his work, the owner cannot claim there is a breach of the contract, or refuse to pay for what has been done.² Where a person, by virtue of a power in the contract, stops work, this is an excuse for the contractor, and allows him to recover for what he has done.³

§ 281. Where one contracts to do certain work by a given time, but not to do a portion of it until directed by his employer, the employer cannot suspend the work so long as to prevent its completion within the time agreed upon. If he does, and then directs the work to be performed, the contractor is not limited by the contract price, but can recover upon the implied agreement to pay what the work so performed is worth.⁴ So, if there be a special agreement, whether sealed, in writing, or oral, to do a piece of work, and it be done with the assent of the employer, although not pursuant to it, either in point of time or in other respects, the contractor can recover what the work was reasonably worth.⁵ The employer, by permitting the contractor to proceed and finish it after the time limited has expired, waives all right to object on that ground, and the law implies a promise on his part to pay for it.⁶ And if an employer accepts work partly done, he can thereafter claim a deduction only for the part not done.⁷

§ 282. Where labor is performed under a special agreement, or a law which remains in force, the action must be brought upon that, and the recovery will be had pursuant to its provisions.⁸ And in cases of contract it must be produced or accounted for.⁹ But if, while the contractor is performing his special contract, the employer gives a separate order to do more or different work upon it, the value of that is not to be measured by the special contract, but there is an implied promise to pay what it is reasonably worth.¹⁰ If a person engages to work, by a void contract, and still performs the work, the contract itself may be referred to as showing the understanding of the parties as to the rate of compensation, which compensation is to be as upon a *quantum meruit*.¹¹

¹ 7 Wend. 121. 43 Barb. 33. See 36 N. Y. 888.

² 9 Bosw. 261.

³ 44 Barb. 81.

⁴ 4 Wend. 285.

⁵ Supra, § 277.

⁶ 10 John. 36. 13 id. 94, 97.

⁷ 25 Wend. 665.

⁸ 12 John. 274. 13 id. 94. 24 Wend. 62, 63. 30 Barb. 430. 19 N. Y. 326. 28 Ill. 378.

⁹ 24 Wend. 60. 1 Sand. 206. 30 Barb. 430.

¹⁰ 1 Mood. & Malk. 413.

¹¹ 1 E. D. Smith, 618. 4 id. 422.

§ 283. Where a contractor puts into an article better materials than he is required to by his contract, he cannot, on that account, recover more than the stipulated price; nor after delivery of the article, require it to be returned because the buyer will not pay an increased price for it.¹ So, where work is undertaken at a given price, the employer is not liable to pay a greater sum by consenting to alterations from the original plan, unless he is either expressly informed or must necessarily, from the nature of the work, be aware that the alteration will increase the expense.²

§ 284. Where A repaired premises held by B under a lease containing a covenant to repair, on a parol promise by B to assign the lease to A, upon his refusing to assign to A, an implied promise to pay A for the repairs was held.³ So, where A, by a fraudulent representation of being the owner of land, induces B to bestow labor upon it in the expectation of enjoying the property as joint owner, B may, upon discovering the fraud, abandon the contract upon which his labor was performed, and recover for its value on an implied promise to pay for it. And in such a case it is no objection that the contract was for an interest in lands, and void by the statute of frauds for not being in writing.⁴

§ 285. But where I contract with you to sell me land, and I enter upon it and improve it, and you refuse to convey, whereby the contract is rescinded, I cannot recover for my labor expended upon the land.⁵ Nor can I, if I enter upon another's land without his consent, or color of right, and clear and improve it. Here, as there is neither a legal or moral obligation to pay me for my labor, a promise subsequently made to pay me for it would be without consideration and void.⁶

§ 286. An action may be maintained for professional services performed at the defendant's request, by an attorney or counselor at law,⁷ a clergyman,⁸ or a physician or surgeon, whether he be licensed or not.⁹ Formerly the fees of attorneys were regulated by statute, but the measure of their compensation is now left to an agreement, express or implied, between them and their clients.¹⁰ It was also, prior to 1844, provided that none but a licensed physician could col-

¹ 3 Car. & Payne, 453. 32 Ill. 252.

² 1 Mood. & Rob. 60. 32 Ill. 252.

³ Ry. & Mood. 420.

⁴ 16 Wend. 25.

⁵ 5 John. 85.

⁶ 5 John. 272.

⁷ 26 Wend. 451.

⁸ 10 John. 244.

⁹ Laws 1844, ch. 275. 2 R. S. (Banks' 5th ed.) p. 66, §§ 38, etc. 1 Redfield, 234.

¹⁰ Code, § 303. 24 How. Pr. R. 521. 25 id. 200.

lect payment for his services;¹ but even then licensed physicians could recover for the services of their students in attendance upon their patients.² If one requests a physician to attend a third person, promising to pay him for it, he is liable even though the request or promise is not in writing; but if he gives notice to the physician to discontinue his visits, he will not be liable for subsequent charges.³ If a clergyman receives a technical "call," those who sign it are not personally liable to him; it is the act of the corporation, which only is liable.⁴

§ 287. A parent or master is not liable for services performed for his child or indented apprentice without his knowledge, unless in a case requiring immediate assistance; as where the child or apprentice was suddenly taken sick.⁵ A master is not, however, liable for necessities or services performed for his hired servant during his sickness, unless at his special request.⁶

§ 288. An action may be maintained against overseers of the poor for medical attendance upon a pauper for whom they are bound to provide, or for his board if furnished at their request; or, when not furnished with their knowledge, if they afterward expressly promise to pay for it; but not otherwise.⁷ So, if a pauper, in a county poor house, works for the keeper for his benefit, and in the poor house, on his promise to pay.⁸ It is held in Indiana, that if a prisoner in their state prison, who is committed on a process void on its face, work in the prison, the lessee of the prison is liable therefor, even without a promise to pay.⁹ But this is an exceptional case, and cannot be sustained under the decisions in the previous note.

§ 289. It has been remarked that where there is an express contract to perform a particular piece of work, or to labor for a certain price, so long as it remains unchanged the contractor can only recover upon a performance of its terms.¹⁰ In actions upon such contracts, and also in all actions for services, whether common, mechanical, or professional, and whether to be performed at a fixed price or not, the defendant may, by way of recoupment, mitigate the damages or defeat the action altogether, according to the justice of the case, by showing that they were done unskillfully, or were worth less than

¹ 1 R. S. (1st ed.) 455, § 22.

² 4 Wend. 200.

³ 1 Bosw. 441.

⁴ 6 Hill, 530.

⁵ 10 John. 249. ² Kent, 265, note b. ⁴ E. D. Smith, 231.

⁶ 2 Esp. R. 739. ² Kent, 265, note b.

⁷ 10 John. 249. 12 id. 352. 13 id. 380. 15 id. 281. 1 Barn. & Ald. 104. ² East. 505.

⁸ 31 N. Y. 319.

⁹ 12 Ind. 241.

¹⁰ Ante, § 271.

the plaintiff's claim, or worth nothing.¹ Thus, if a surveyor makes an estimate which turns out to be incorrect to a considerable amount, through his neglect to examine the ground for the foundation of the work, he is not entitled to recover anything for his plans, specifications, and estimates, made for it.² So, an auctioneer guilty of negligence, whereby his sale is void, cannot recover for his services.³ If one party hinders the other from completing the contract within the specified time, this is a legal excuse for a non-performance within such period.⁴ So, if the plaintiff agreed to do certain work on the defendant's house, which burns up before the same is completed, he may recover for what he has done, on the principle that the defendant is in default, legally, by not having the house in readiness for the labor to be performed.⁵

§ 290. A professional person, as an architect, dentist, surgeon, coachman, physician, apothecary, farrier, attorney, or engaged in any other profession, impliedly undertakes, as a general rule, that he has ordinary skill and that he will execute the business intrusted to him with ordinary care and skill. If he fails in this duty he is guilty of default in his undertaking, and cannot collect pay for his services, but is liable in damages to the persons who employed him.⁶ For these reasons, an attorney cannot recover against his client for his services in an action, where the judgment obtained by him is set aside for irregularity, nor for opposing a successful motion to set aside his proceedings, nor for money paid to satisfy the costs of a judgment of discontinuance obtained against his client in consequence of his negligence or ignorance.⁷ But proof that a judgment as in case of nonsuit, was obtained against the client, is not, of itself, evidence of negligence.⁸ The negligence must be gross. If he acts in good faith and to the best of his skill, and with a moderate degree of attention, he is not answerable.⁹ Nor is he answerable for an error or mistake on a point of law in regard to which a reasonable doubt may be entertained, or on a nice point of practice.¹⁰ If, however, he

¹ 7 East. 479. 2 Com. on Con. 363. 3 29 id. 435. 23 Ill. 385. 32 id. 252. 31 Stark. 6. 2 Wils. 359. 14 John. 377. 9 Mis. 375. Also, cases in last section. 8 Cowen, 57. 1 Camp. 38. Anth. N. P. 168, Car. & P. 479. 7 id. 84. Id. 289. 40 Ill. 209. See 3 Kansas, 389. 17 Ohio, 253. note b. 3 Wis. 323.

² 1 Car. & Payne, 352.

³ 3 Camp. 451.

⁴ 36 N. Y. 388.

⁵ 1 Keyes, 476.

⁶ 31 Barb. 534. 8 East. 348. 2 Wils. 325. Id. 359. 2 Bosw. 234. 39 Maine, 155. 29 Vt. 198. 14 Ind. 595. 17 id. 115.

28 Texas, 425.

⁷ 12 Wend. 517. See 15 Mass. 316.

⁸ 9 Cowen, 57. Also, 15 Mich. 244.

⁹ 4 Burr. 2060. 9 Cowen, 57. 3 Camp. 17.

¹⁰ 4 Burr. 2060. 1 Nev. & M. 262. 3 Barn. & Cress. 738. S. C. 5. Dew. & R. 635.

has specific lawful instructions from his client, he is answerable for all damage occasioned by disobeying them. He should advise the client to the best of his judgment, and if the client will not follow the advice, it is safer for the attorney to follow the client's instructions so far as the rules of law will permit.¹ Where he is sued for negligence in suffering a judgment by default, and the negligence is proved, it is for the attorney to defend himself by showing affirmatively that the client had no defense in the action.² An attorney does not impliedly undertake that the client will gain his cause, nor the physician that he will cure; they only promise to exercise a fair, reasonable, and proper degree of skill.³ If the employer selects a quack, or an incompetent practitioner or counsel, he can only ask for corresponding skill to be exercised.

§ 291. A recovery may be had in some cases where the work is defectively performed, if it is in the main substantially according to the contract. As where a party contracted to supply and erect a warming apparatus, the jury were directed, if they thought it substantial in the main, although not quite so complete as it should have been, and capable of being made good at a reasonable outlay, they might find a verdict for the contractor, deducting such sum as would enable the employer to render it complete.⁴ But where one contracted, for a fixed price, to erect a bridge in a particular manner, and he built it so unfaithfully that although it served for a time, yet, from the defective manner of building, it afterward gave way, it was held that the contractor could recover nothing for it.⁵

§ 292. Instead of setting up the defense of unfaithful or defective performance of the service by the contractor, the employer may pay for the service and then bring an action against the contractor for the damage he has sustained.⁶ But if an action is brought against him for the service, he should either pay for the work before judgment obtained against him, or interpose his defense. For if he suffer the contractor to obtain a judgment against him for the service, it will entirely cut off his remedy for his damages.⁷

§ 293. In an action brought by an attorney for his services, it is necessary to show his retainer, either by proving the original employment, and the performance of services, or some recognition of him

¹ 8 Mass. 57. 12 Ind. 318.

² 7 Bing. 413.

³ 8 Car. & P. 479. 7 id. 84. Id. 289.

⁴ 5 Car. & Payne, 337.

⁵ 14 Mass. 282.

⁶ 2 Com. on Con. 363. 2 Wils. 325, 359. Chit. on Con. 166.

⁷ *Infra*, § 1089. 1 John. Cas. 492. 8 John. 453. 8 Wend. 109.

by the client during the progress of the suit; for the fact that he acted as attorney, or was recognized as such by the opposite party, is not enough.¹ And it is a good defense to the action to show that the attorney agreed to conduct the cause gratis, or (under the Code of New York), that the attorney shall receive the taxable costs and a percentage on the amount recovered, for a portion of his compensation.²

§ 294. The action for labor and services may be maintained by any public officer against the party who employs him; as a commissioner or referee to examine witnesses, a sheriff, justice, constable, etc.³ In the case of a sheriff, coroner, or constable, the rule is that in all cases where process is given them to serve, which is valid upon its face, they may recover their fees for its service against the person issuing it.⁴ But if they arrest one known to be by law privileged from arrest, they are not entitled to fees, as the arrest is void.⁵ Where the process is issued by an attorney, the sheriff may collect his fees of him, as where he summons a jury for a circuit, notwithstanding he goes out of office before the circuit occurs.⁶ It may be maintained by witnesses for the fees allowed them by the statute, if they attend court either at the request of a party or upon a subpoena, and whether examined or not.⁷ But as the law allows no compensation to witnesses, not experts, for loss of time beyond their statutory fees, a promise to pay for it is not binding.⁸ An agreement by which a person is to be paid a stipulated sum for giving testimony, in addition to his traveling expenses and pay as an expert, is void as against public policy, and the witness in such a case cannot even recover his traveling expenses, nor his usual per diem or pay as an expert.⁹

§ 295. Although it has been questioned, in England, whether an arbitrator could recover for his services, unless upon an express promise made either before or after they were performed, to pay for them, it is well settled in this country that he can, and that where the submission is to several, each must bring a separate action for his compensation.¹⁰

¹ 9 John. 142. 3 Barb. 64. 11 How. Pr. 46. 14 John. 357. 15 id. 260. 1 Binney, R. 452. 1 E. D. Smith, 318. 26 Ill. 218. 18 How. Pr. R. 168. 5 John. 351. 1 Hill, 76.

² 3 Stark. 185. 23 Barb. 420.

³ 5 John. 252. 9 id. 328. 4 Mass. 411. 5 Maule & Sel. 156. 4 Moore, 300. Carthew, 208. 1 Kern. 408. 17 How. Pr. R. 289. See aliter as to experts or professional men. 7 J. Scott, N. S. 628. 2 Car. & Kir. 23.

⁴ 13 John. 378.

⁵ 10 John. 93.

⁶ 5 John. 252. 9 id. 114. 6 id. 125.

⁷ 9 Bosw. 116. 7 Bing. 369.

⁸ 1 Denio, 188. 1 Pars. on Con. 538, note x.

[§ 295*a*.] Teachers of select or private schools may recover pay for the tuition bills of those who have employed them. And so those of public schools, if they bring themselves within local laws, and are entitled by those laws to recover; in which case their suit must be against such parties as the law makes the proper ones.¹ If the teacher of a private school undertakes to furnish board, with suitable instruction, it is a good defense to show that he failed in either respect.² And the teacher cannot, in such a case, for any transgression of the pupil, turn him into the streets, without forfeiting his compensation.³

§ 296. An action for labor and services can be maintained by a broker employed to complete a purchase or sale, when he has completed the same, or made such a contract as his employment authorizes him to negotiate, but which his employer capriciously or causelessly refuses to perform, or puts it out of his power to perform;⁴ if without the broker's fault, and when he has acted in the customary course of business, his principal is damaged, the broker is not liable therefor.⁵ An action also may be brought by one employed to procure a pardon;⁶ against a committee appointed at a public meeting to carry into effect its objects, for services performed at their direction;⁷ against an employer who hired a clerk at £200 per year, payable quarterly, and dismissed him, paying him only to the time of dismissal, for the salary to the end of the quarter;⁸ and generally for services performed under any contract not under seal, which has been fulfilled or rescinded,⁹ or for work done upon any contract, whether under seal or not, not pursuant to it, but upon some new arrangement or agreement of the parties.¹⁰

§ 297. The law compels no one to pay for services voluntarily performed for him, however beneficial to him, unless upon his express or implied request.¹¹ This rule has been held in the following cases: J. owned a stubble field in which B. had a stack of wheat which he had promised to remove in season for preparing the field for a fall crop. The time to remove it having arrived, J. sent a request to B., which, in his absence, was delivered to his family, that the stack

¹ See 7 Wend. 181. 10 Barb. 290.

² 1 Stark. 157.

³ 7 Car. & P. 768.

⁴ Fitzg. 302. 12 East. 1. 10 Mass. 287.

⁵ 40 Barb. 541.

⁶ Cowen, 564. 7 Cranch, 299. 4 Wend.

⁷ Fitzg. 302. 31 N. Y. 462 and refs. 5 285. 11 id. 478.

Bosw. 73. 37 Eng. Law and E. 438.

⁸ 14 John. 330.

⁹ 5 Bosw. 506.

¹⁰ 21 Ill. 76. 2 Beasley, 246. *Infra* § 298.

¹¹ Hob. 105, (3 Esp. 253, *contra*.)

32 Ill. 206.

¹² 6 Wend. 649.

should be removed, as he wished the next day to burn the stubble. The sons of B. answered that they would remove it by 10 o'clock the next morning. After waiting until that hour, J. set fire to the stubble in a remote part of the field, and finding the fire spreading rapidly, and threatening to burn the stack, J. set to work and removed it to a place of safety. The court held that no action would lie for the service.¹ Where labor is performed by one for another, the law presumes a request and promise to pay, unless it is understood that it is to be performed gratuitously, or it is performed under such circumstances as repel the presumption of a promise.² A woman who has lived with a man as his wife, supposing herself to be such, cannot, on discovering that their marriage was void, recover for her services, on an implied promise to pay for them.³ Where a minor was indentured as an apprentice by void indentures, or one supposed to be a slave, but free in reality, worked for another, it was held neither could recover for his services.⁴ A partner cannot recover for his services in settling the affairs of the firm, unless an agreement is made therefor, and this even where he is a surviving partner; but if, after the death of one partner, the survivor carries on the business profitably, he is entitled to a compensation, to be deducted from the profits.⁵ A workman cannot recover for time spent in examining plans and specifications, if his offer to perform the work is rejected.⁶ The law does not imply a promise to pay for board or services rendered by members of the family to each other;⁷ therefore, where children, before or after their minority, or step-children, grandchildren, mother-in-law, or a brother or other person, even when not a relative, living in and being a part of the family, render services in the ordinary duties of the household, and as members of the family, and are provided for and supported as such, without any contract or understanding that they shall receive pay for their services, or pay for their board, the law will not imply any, nor allow a recovery therefor.⁸ But slight circumstances will be sufficient to raise the implication, and authorize a recovery. Thus,

¹ 20 John. 98.

² 20 Barb. 387. 21 How. Pr. R. 211. 1 Redfield 234. 31 Mis. 255.

³ 27 Barb. 310.

⁴ 12 Barb. 473. 5 Cowen, 531. 14 Wend. 209.

⁵ 2 Duer, 513. 23 Cal. 427. 23 Wis. 651.

⁶ 1 E. D. Smith, 609.

⁷ 2 Beasley, 151. 6 Ind. 60. 21 id. 309. 48 Barb. 327.

⁸ 3 Comstock, 312. 15 Barb. 444. 11 id. 224. 43 id. 603. 48 id. 327. 2 Bradford, 336. 3 Ind. 156. 6 id. 60. 18 Ill. 46. 26 id. 81. 5 Wis. 472. 21 How. Pr. R. 211. 23 Ind. 50. 24 id. 352. 25 id. 174. 26 id. 207. 27 id. 323. 28 id. 89. 29 id. 618. 41 Mo. 441. 32 Wis. 93.

that a step-son was sent for to enter into the employment, and that a set-off was filed, including charges for board, clothing, education, money advanced, &c., or other circumstances less than an express agreement will be sufficient.¹ It is said in Indiana that the above general rule does not apply to infants.² In other cases the distinction does not seem to have been made, and in many of them the rule was applied to them.

§ 298. An exception to this rule is made in the case of goods and vessels lost or abandoned in distress at sea, which are saved by other persons. Here the person, who by his labor saves them, may claim a reasonable compensation for his services, and may also retain the possession of them until paid.³ But one who saves property from fire, or from water, or who secures boats astray, or solicits supplies of food, or performs other unsolicited service, cannot recover.⁴ If, however, he has incurred necessary expense, or suffered damage in securing or caring for, or storing the property of another which is lost, afloat or astray, and it is afterward reclaimed, the owner should repay such expense, or pay such damage; and if he refuses, an action will be allowed to recover therefor.⁵

§ 299. Where the services are performed upon an express agreement that the remuneration shall be such as a third party shall think reasonable, no recovery can be had for them if it be shown that no application has been made to the third person to fix the amount.⁶ So when a contract requires that a certificate of performance be given by some officer or person, as an architect, to entitle the contractor to payment, the procurement of that certificate is a condition precedent to his right to claim the money, and, in the absence of fraud or palpable mistake, that certificate is conclusive between the parties.⁷ But if an architect unreasonably and in bad faith refuses the certificate, or the employer, by stopping the work, or otherwise, prevents the giving of the certificate, or fraudulently procures the certifying party to withhold it, then its procurement is excused, and the contractor may recover if he has, in fact, completed his contract.⁸ If the agreement is that the remuneration for the services shall be entirely at the discretion of the employer, no action lies for them.⁹

¹ 26 Ill. 81. 5 Wis. 472. 43 Barb. 603.

² 42 Barb. 373.

See also 6 Ind. 60. 23 id. 50. 28 id. 89.
41 Mo. 441.

³ 4 Car. and Payne, 93.

² 27 Ind. 323.

⁴ 4 Duer, 295. See 9 Bosw. 261. 7 Wis. 516.

³ 1 Ld. Ray. 393. Abbot on Ship. 356.

⁵ 26 N. Y. 26. 17 id. 176. 9 Peters, 319. 44 Barb. 81. 2 Hurlst. & Colt, 42.

⁴ 42 Barb. 372. 2 W. Black. 1117. 1 Esp. 86.

⁶ 4 Dal. 111. 1 Maule & Selw. 290.

But if performed at the request of the party, nothing having been said relative to payment, a promise to pay for them is implied.¹ Thus, where one, without any contract, express or implied, but in expectation of a legacy, labors for another, no action lies for the services.² But if the services are rendered at the request of a testator, under the expectation and mutual understanding that compensation will be made by a legacy, or if either before or after they are performed, he promises to pay for them, or if he promises to do with the person rendering them as his own child or to make him his heir, or purchase a farm for him, and dies making no such provision for him, an action can be maintained for the services.³ In such cases the recovery is only for the intrinsic value of the services performed.⁴

§ 300. A request to one to perform a certain service with a promise to make him a present, is evidence of an implied contract to pay a reasonable compensation for it.⁵

§ 301. If A employ B to do certain work, and without the privity of A, B employs C to perform it, there is no implied promise on the part of A to pay C for it.⁶ But if A employs B, and agrees to pay him, it is no defense to an action for compensation that A agreed to pay some third person who has no right to it.⁷

§ 302. Where one illegally avails himself of the labor of another servant, as where he harbors and employs another person's minor child, apprentice or servant, the master may waive the tort and recover the reasonable worth of the services upon an implied promise to pay for them.⁸ The rule extends to the unauthorized detention of a person of full age who is hired by another for wages.⁹ The employer of a servant already hired to another must, however, have notice of the fact to make him answerable.¹⁰ It is provided, in New York by special statute, that in the case of services performed by minor children, it shall be necessary for their parents or guardians to notify the party employing them within thirty days after the commencement of their service, that they claim the wages of the minor, and in default of such notice, payment to such minor shall be valid.¹¹

¹ 1 Yeates, 209. 4 id. 353.

⁷ 20 Barb. 387.

² 2 Str. 728. 1 Esp. 187. 13 Wend. 460.
² Beasley, 246.

³ 3 Maule & Selw. 191. 3 Yeates, 250.
13 John. 322.

³ 3 John. 199. 13 id. 379. 5 Barb. 469.
36 id. 128. 3 Brad. 199. 24 Ind. 280.

⁹ 3 Denio, 369. 15 Barb. 499.
¹⁰ 6 John. 274.

⁴ 25 Barb. 433.

¹¹ Laws of 1850, ch. 266. 3 R. S. (Banks' 5th ed.) 242, § 8. The law in Iowa is similar; see 16 Iowa, 214. 22 id. 306.

⁵ 5 Taunt. 302.

⁶ 6 Taunt. 147. 1 Marsh. 500. 2 Yeates,

The language of the statute is very general, but it is believed that it was not intended to extend to the wages of minors harbored and employed against the will of the parent or guardian.

§ 303. The reputed father and mother of a bastard are by statute made liable for its support; and in case of their default or inability, it is supported as a pauper,¹ and there are various provisions for ascertaining the father and compelling him to furnish means for its support. It is customary, when the means are provided, for superintendents or overseers of the poor to employ its mother to nurse and take care of it. But no action lies by her against them for its maintenance without showing an express promise to pay, or circumstances from which one may be implied, as by placing the child with her, or a request to maintain it, or that they had received moneys for its maintenance under an order of filiation.² Nor will an action for the support of a bastard lie against his father, except upon his express promise, unless he adopt it, in which case, while the adoption continues, a promise may be implied in favor of the person providing for it.³

§ 304. It is also provided by statute that the father, mother and children who are of sufficient ability, of any poor person who is blind, old, lame, impotent or decrepit, so as to be unable by work to maintain himself, shall at their own charge relieve and maintain him in such manner as shall be approved by the overseers of the poor of the town where he may be,⁴ and there are provisions to compel the performance of the duty. But an action for services done or necessities supplied toward the maintenance of an aged parent will not lie against his child, unless rendered or furnished at the child's *previous* request or promise to pay, or under such circumstances that one may be implied. If there is neither, the only remedy against the child is given by the statute. By its means he may be compelled to furnish his parent a support, but an implied promise to pay for the services or provisions cannot be founded upon the parent's necessities.⁵ The provisions of the statute extend only to natural relations.⁶ A husband therefore is not bound to maintain his wife's bastard children born before his marriage. Neither is a father bound to support the bastard child of his daughter, nor a son-in-law his wife's mother.⁷

¹ 2 R. S. (Banks' 5th ed.) 906, § 2.

⁵ 16 John. 281.

² 12 John. 195. 8 Cowen, 651.

⁴ 4 Wend. 403. 4 East, 76. 4 Term R.

³ 19 Wend. 405. 25 id. 619. 2 Kent, 215.

118.

30 Ind. 240.

⁷ 7 Cowen, 235. 5 id. 106, 121. 3 N. Y.

⁶ 2 R. S. (Banks' 5th ed.) 836, § 1.

Leg. Ob. 354.

If, *after* the support has been furnished, the child promises to pay for the same, it is void as without sufficient consideration.¹

§ 305. IV. FOR MONEY HAD AND RECEIVED BY THE DEFENDANT TO THE PLAINTIFF'S USE. An action may be maintained in all cases where one has received money belonging to another, which in equity and upon principles of natural justice, he should pay over to him.² To support it, it is, as a general rule, necessary to prove that the defendant or his agent actually received money or its equivalent, as bank notes circulating as cash, for the use of the plaintiff;³ mere money's worth is not sufficient.⁴ Where, however, the property is saleable, the receipt of money may be presumed, particularly after the lapse of a reasonable time, until the contrary be proved.⁵ And property received *as money* will support the action.⁶ The entry of a check as cash, made by an officer of a bank in the private bank book of the holder, is an equivalent to a payment of cash, and the bank is bound thereby even if the check turns out to be forged, the forgery being unknown to the holder.⁷

§ 306. Where property has been wrongfully taken from the owner and sold by the wrongdoer, the owner may waive the tort and affirm the sale, and maintain an action against the wrongdoer for the price of it, as money received by him to the owner's use. But if the use to which the property be put is prohibited by law, he cannot recover the money received for it.⁸

In New York and some other states, the rule is as stated above; in some of the states, however, as in Illinois and Nevada, the tort cannot be waived except in cases where the goods have been wrongfully sold by the defendant, and then the plaintiff recovers only the amount received on the sale.⁹

§ 307. Money is received under an implied promise to pay it to the proper owner :

1. When received by an agent for his principal, an attorney for his client, a sheriff or constable on an execution, or a justice in the

¹ 3 Pick. 207. 13 Barb. 502. 7 Conn. 57. ⁶ 7 Cowen, 668, ⁷ 4 Dall. 234. 10 Wheat. 333. 1 Bin.

² 2 Denio, 91. 11 Iowa, 506. 8 Mich. 433. 18 id. 9. 45 Ill. 128. 20 id. 650. ³ 1 N. H. 151. 1 Hill, 240. 3 Greene,

³ 13 East, 20. 3 Bibb, 378. 6 Conn. 95. Iowa, 599. *Infra*, § 777. ⁴ 2 Scam. 317. 4 Gilm. 406. 35 Ill.

⁵ 3 Burr. 2589. See 3 Bibb, 378. 11 Mass. 494. 4 Pick. 60. 11 John. 464. 4 Nevada, 249. 1 Hill, 240, note. See 3 Greene, Iowa, 599.

⁶ 1 Doug. 138. 4 Term, R. 687. 3 Bos. & Pull. 559. 4 Bing. 178. 3 Barb. 19.

course of his business, all of whom in some degree are agents of the party for whom they receive it;¹ and the action will lie even if the money was paid in satisfaction of an illegal contract, if the agent had nothing to do with the contract.²

2. When paid under mistake or through the deceit of the other party. As when two men are reckoning, if one through mistake overpays the other, the latter receives it to the use of him paying it; and if one falsely tell me he has paid certain money or performed certain work for me, and I pay him for it, the money so obtained from me by the deceit, is received by him to my use. In case of a mistake, it must be a *mistake of fact*. That is, there must some fact exist which is unknown to the parties, with a knowledge of which the payment would not have been made, or some fact be supposed to exist which induces the payment, which really does not exist. The principle upon which the rule is founded is, that if the parties believing that a certain state of facts exists, come to an agreement with such belief for its basis, on discovering their mutual error they are remitted to their original rights.³ But a *mistake of law* will not avoid the transaction, nor render the money in the hands of him who receives it the money of him who paid it. As where one is truly acquainted with the facts, but is ignorant of or misconceives their legal consequences. Here his mistake is one of law, and the party receiving the money takes it to his own use.⁴ Ignorance of the law of a foreign government is ignorance of fact.⁵

3. When paid upon a consideration which happens to fail;⁶ as if I advance money to a man for carrying my goods, and without my fault he fails to carry them; or to one upon his promise to sell and deliver me certain goods, and he fails to do so. See 39 *Ill.* 164.

4. When paid as a consideration for an agreement which is afterward rescinded. As where A and B make a contract for the sale and purchase of a quantity of timber to be delivered at a future day, and fifty dollars upon account of it is paid by B at the time of making the contract; on the rescission of the contract A is held to have received the money to the use of B. In such a case, however, when a purchaser would rescind a contract and entitle himself to the

¹ 29 Barb. 59. 30 id. 238. 1 Daly, 54. ⁴ 1 Wend. 355. 20 id. 174. 1 Hill, 287.
25 Ill. 226. 16 Ind. 320. 9 Pick. 112. 2 Hall, 252. 16 Ind. 29.

² 5 Bosw. 645. 10 id. 309.

⁵ 8 Barb. 233.

³ 4 Ind. 43. 40 N. Y. 391. 4 Bosw. 337. ⁶ 12 Minn. 326. 25 Ill. 411.

7 Mich. 325.

money paid upon it, he must place the vendor in the same situation that he was before the sale.¹

5. When paid to one acting under or in pursuance of a *void authority*. As if one come to me, in behalf of my creditor, with a forged order or power of attorney to receive the debt, and I pay him the money. Here, although both of us may have supposed the order or power of attorney to be good, yet the authority being in fact forged and void, the money was received to my use.

6. When obtained by *compulsion, extortion, imposition, or taking an undue advantage of the party's situation*.² As where I pledge my horse for a debt of one hundred dollars, and the bailee upon my tender of the sum owing, refuses to re-deliver him unless I pay an additional sum, which in order to obtain him, I pay; where one sells me lands which have no existence, and receives of me the money for the price; where my friend is insolvent, and I give one of his creditors a sum of money to induce him to become a petitioning creditor, or to grant him a letter of license; or where a sheriff or constable or other officer extorts money, or receives exorbitant fees. But money paid under an order, decree or judgment of a court, although the judgment is fraudulent, is not received to the use of the party paying it.

7. When embezzled, or moneys of which one has been defrauded by cheating or otherwise. As where money is embezzled or stolen by one's clerk, servant or other person, or obtained from him by any cheating at play by false cards or dice.

8. When paid under a judgment or adjudication of any court which is afterward reversed for error. By the New York Code (§§ 330, 369), on such reversal, the court orders restitution of the amount paid and interest.

9. When paid upon any contract declared void, either by common law or statute, except in cases where the party himself is a party to the criminality, as in case of an usurious contract. And where a contract is entered into, the object of which is to violate the provisions or the spirit and policy of a public statute, and one pays money in furtherance of it, and it is in part executed by a partial accomplishment of the original design, leaving a portion of the money advanced unexpended, an action will not lie to recover it back. In some cases, however, statutes provide that one paying money on an illegal contract may recover it from the person receiving it, as where

¹ 5 John. 585. 2 Watts, 433. 9 Ind. ² 8 Bosw. 148. 9 Cal. 365. 11 Ohio, 166. 14 id. 349. 11 Wis. 193. N. S. 534.

money is wagered,¹ or paid for a chance in a lottery or raffle,² or where more than twenty-five dollars is lost at play.³

All cases which arise may be more or less easily grouped in principle, under one of these heads.

§ 308. In order to give illustrations of the classes of cases enumerated in the preceding section, the following abstract of decisions under each of them, where actions have been, and where they have not been maintained, has been collated. They are not given as all the reported decisions, but as sufficient to show the variety of transactions from which are implied the receipt of money to the plaintiff's use, and a promise to pay it to him, and such as are not within the rule, as given (and now corrected), in the fourth edition of this Treatise, with some additional cases.

Under the FIRST CLASS, when received by *agents, attorneys, officers, &c.*, and held to be received to the plaintiff's use: Money received by an agent or attorney for the plaintiff, who refuses to account for it and pay it over; 4 *Day*, 175; 3 *Greenl.* 369; 7 *id.* 298; 3 *Cowen*, 623; or where he has received a note for the plaintiff for which he refuses to account; 3 *Mass.* 403: received by the defendant to pay over to the plaintiff; 11 *Mass.* 147; 3 *Har. & McHen.* 451; 17 *Mass.* 575, 400: received by the defendant, a banker, to pay a bill deposited with him belonging to the plaintiff, although the banker's clerk had told the person paying the bill he could not give it up until he had seen his master; 14 *East*, 582, *n.*: received by the defendant from the plaintiff to retain until it should be ascertained whether it should be paid to a third person, and by the defendant paid over without plaintiff's concurrence; 7 *Moore*, 465: received by the defendants, assignees of a bankrupt, or an insolvent debtor, and due to the plaintiff for his dividend under the order of the court; *Doug.* 407, or received by him under a voluntary assignment in favor of creditors; 4 *Pick.* 59: received by the defendant to whom securities had been given in trust to collect and pay certain debts, and the balance to the plaintiff; 12 *John.* 276; 1 *Har. & Gill*, 485: where the defendant, plaintiff's factor, had sold his goods and taken in payment for them and a debt of his own, the purchaser's bond, although no money in fact had been received; 6 *Cowen*, 183, *note a*: or where he has received the purchaser's note, when not authorized to sell upon credit; 5 *Pick.* 389: or where goods have been consigned by the plaintiff to the defendant to sell, and he, after an unreasonable

¹ 2 R. S. (Banks' 5th ed.) 924, § 9.

² 2 R. S. (Banks' 5th ed.) 925, § 14.

³ 2 R. S. (Banks' 5th ed.) 929, §§ 31, 32.

time has expired, has refused to render an account of them; 7 *Pick.* 214: or where he sells with a *del credere* commission when the term of credit has expired; 7 *Pick.* 220: the plaintiff's share of moneys received by the defendant as the whole price of an article held by him and the plaintiff as tenants in common; 15 *John.* 159; 1 *Wend.* 470; 5 *Greenl.* 381; 11 *Iowa*, 506; 43 *Barb.* 215: the plaintiff's share of the proceeds of a fishing voyage on which he was a sailor, received by the defendants, the owners of the vessel, on sale of the cargo; 7 *Pick.* 146: the plaintiff's share of moneys received by the defendant, his co-surety, for the amount they have been compelled to pay as bail for a third person; 1 *Wend.* 202; 5 *id.* 48: received by the defendant, a nominal party in a lawsuit conducted by the plaintiff; 4 *Mass.* 326; 6 *Cowen*, 193: received by the defendant from the plaintiff as stakeholder upon an unlawful wager; 10 *John.* 468; 3 *Denio*, 103; 1 *Comst.* 392: received by the defendant, the drawee of a bill of exchange which he had not accepted, to enable him to pay it, the plaintiff being the endorsee of the bill; 3 *Camp.* 176: received by the defendant, the drawer of a bill from the plaintiff, the acceptor, to pay it, where the drawer succeeds in a defense upon the bill; 3 *Camp.* 107: received by the defendant, the holder of a note from the plaintiff, an endorser upon it, to pay a judgment recovered upon it against the plaintiff, when it appeared that previous to the payment the defendant had discharged a prior endorser; 4 *Wend.* 360: where the defendant, an insurance broker, had, without receiving for the plaintiff his principal, moneys due him from the underwriters, discharged them upon an adjustment with them of private accounts; 1 *Camp.* 399: money levied by the defendant, a sheriff, upon the plaintiff's execution; 6 *Cowen*, 465; 1 *Wend.* 534: where the defendant, a sheriff, has returned an execution as collected, without demand of payment; 3 *Camp.* 347; 2 *Greenl.* 91: where the defendant, a sheriff, has taken a note from a defendant in an execution to indemnify him for an escape, and the plaintiff has demanded the note and he refuses to give it to him; 5 *Wend.* 207: moneys received by the defendant, an administrator, who has drawn an order in favor of the plaintiff for his debt against the intestate, the order having been allowed defendant on his accounting, but never having been accepted by the drawee; 13 *John.* 510: received by the defendant as the fees of an office belonging to the plaintiff, under pretense of title; 2 *Mod.* 260; 2 *Lev.* 245; 2 *Show.* 21; *T. Jones*, 126; *Freem.* 473; 14 *Abbott*, 178; 20 *Ind.* 1: received from the public treasury by the defendant, the principal keeper of a penitentiary, to

pay the plaintiff, a deputy keeper, for his services; 7 *Har. & John*. 157; 30 *Barb.* 238: or by a government agent to discharge a contract with plaintiff, upon refusal to pay over to him; 9 *Mass.* 272: under the lien law of the city of New York, an action for money had and received was maintained by a mechanic against the owner of a building for moneys due by the contractor to the mechanic for work done; 12 *Wend.* 373.

In the following cases, however, an action for money had and received has been held not to lie: against an attorney, for moneys collected by him where a demand had not been made before suit; 5 *Cowen*, 376; 4 *Greenl.* 532; 37 *Mo.* 180; see also 6 *Hill*, 540: by a plaintiff who was an agent of A, against a bona fide assignee of an award in favor of A, which included expenses incurred by the plaintiff in obtaining it, and due to him from A; 4 *Day*, 42: by a plaintiff against the defendant, to whom he had paid a note sent by A to be collected of plaintiff, and the proceeds to be paid to B, a creditor of A, the plaintiff protesting against such payment by the defendant; 14 *East*, 582: against a banker who receives from the agent of several persons a sum to distribute among them, after the agent has drawn out part of the fund and distributed it; 5 *Taunt.* 447: by a creditor against a defendant with whom A has deposited £100, to be distributed to his creditors in proportion to their claims, before the proportions in which the distribution is to be made is determined; 1 *Stark*, 298: against one to whom money has been paid in trust for a specific object, as for conducting an action, until the trust is closed and it appears that a balance is left; *Holt's N. P.* 500: by the survivors of an insolvent firm, whose agent having power to collect its debts and pay over their proceeds to its creditors, has left money with the defendant to pay debts due from the firm; *Anth. N. P.* 45: by the assignees of an agent to recover money paid by him to his principal, the principal knowing that the agent had not received it; 4 *Barn. & Cress.* 715: against one who receives money for one purpose and applies it to another, that is, lays it out on a bad instead of a good security; 2 *Brod. & Bing.* 372: against one with whom a sum of money had been left by plaintiff to indemnify him against bills of exchange which he had endorsed for the accommodation of another, the bills still outstanding but barred by the statute of limitations; 3 *Camp.* 418: by a workman to recover of his immediate employers moneys beyond what had been paid him, it appearing that they had received a larger sum for the object from the person for whom the work was done; 2 *Car. & Payne*, 363: against one

bound by contract to pay a sum when he shall receive it of his debtor, he having taken a mortgage from the debtor to secure the debt; 4 *Pick.* 60: to recover the value of foreign securities paid to the defendant where he has had no opportunity of turning them into money; 1 *Younge & Jer.* 380: where plaintiff paid money to seamen in advance for their wages, which they deposited with the defendant to indemnify him for covenanting that they should not desert, they having deserted; 13 *John.* 508: where a debtor of plaintiff placed money in defendant's hands to pay the debt, there being no communication or understanding between the plaintiff and the debtor concerning it; the reason here given was that there was no privity between the plaintiff and the defendant, and the debtor might at any time make a different disposition of the money; 24 *Wend.* 260: by plaintiff against an agent whom he had directed to send money by a certain route, when the agent sent it by another, by which means the money got into the hands of his creditors; 2 *Camp.* 68: by a banker against a partnership for money paid by him and charged the partnership upon a bill drawn by one of the partners in his own name, the bill having been negotiated by the same agent who had procured discounts from the banker for the firm; 15 *East*, 7: by one who lays illegal wagers in the defendant's name, and then without his subsequent direction pays them; 4 *Taunt.* 165: by plaintiff in whose name defendant makes a contract, sues and collects money upon it without the knowledge of the plaintiff; 4 *Taunt.* 380: by a landlord against a sheriff who sold the goods of a tenant without paying a year's rent due; 3 *Camp.* 260: where the plaintiff, a servant of the defendant, found bank notes and showed them to him, and he took them, saying they were not his, but refused to deliver them back, the court holding that the action should have been for their wrongful conversion; *Esp. Dig.* 99: by the purchaser of an equity of redemption against a mortgagee for the surplus arising on sale of the mortgaged premises, the mortgagee having obtained a judgment against the mortgagor, which was a lien against them at the time of the purchase of the equity of redemption; 13 *Wend.* 488: against a pauper by overseers of the poor, for money advanced for his relief; *Chip.* 45.

§ 309. Under the SECOND CLASS of cases, where in consequence of *mistake* or *deceit*, the defendant is held to have received money to the plaintiff's use, are the following: as a general rule, the inquiry is to which party, in equity and justice does the money belong; 2 *Denio*, 91; 24 *How. Pr. R.* 358; 18 *Cal.* 165, 404: money paid to

defendant by the plaintiff under a mistake of facts; 6 *Barn. & Cress.* 671; 3 *Wend.* 412; 3 *id.* 69: overpaid by mistake on a purchase of goods, or where by mistake, a note for goods purchased was given for more than the price, notwithstanding it was paid after the discovery of the mistake; 4 *Pick.* 228: where on settlement of a bond the obligor was, by mistake, credited with a year's interest which had not been paid; 8 *Wend.* 561: money paid the defendant for a bank note or a bill of exchange which turns out to be a forgery, neither party knowing it at the time; 5 *Taunt.* 488; 2 *Har. & John.* 368; 1 *Hill,* 287; 2 *Sand.* 431; 1 *Coms.* 113: but in the case of a forged bank note it should be returned within a reasonable time, or the right to recover the money paid for it will be waived; 17 *Mass.* 33; 6 *Hill,* 340: paid by the plaintiff to defendant for an endorsed note, the endorsement being a forgery; 3 *Yeates,* 531: paid by the plaintiff to defendant in taking up a bill for the honor of a supposed endorser, where the signature of the drawer, acceptor and endorser are forgeries. In this case, there were several genuine endorsements struck out by the plaintiff, but the fact of the forgeries was discovered and communicated to the defendant in season to enable him to charge the endorsers, whose signatures were genuine; 5 *Dowl. & Ryl.* 403; 3 *Barn. & Cress.* 428: paid by the plaintiff, the banker of the supposed acceptor of a forged bill, to the defendant, the agent of an endorser; 1 *Car. & Payne,* 197; *Ry. & Mood.* 49: where the plaintiff, the promisee of a note, received from the defendant a counterfeit bank bill in payment; 6 *Mass.* 182: money paid by the plaintiff to defendant upon the return of a bad check, mistakenly supposed to have been sent by the plaintiff to the defendants' bank; 3 *Mass.* 74: paid by the plaintiff, the endorser of a note void in its creation, to the defendant, the holder of the note, notwithstanding the endorsement was bona fide; 8 *Mass.* 402: money received by the defendant upon an execution in his favor, the proceeds of goods not belonging to the debtor, levied upon and sold by the sheriff, the plaintiff; 2 *Camp.* 452; 9 *Ind.* 1; 10 *id.* 172; 6 *Iowa,* 219: where the plaintiff, the endorser of a bill upon which he has not been charged, pays it under the belief arising from a misapprehension of facts that he is liable; 9 *Mass.* 408: money paid by a guardian for his ward for a deed of land which the ward had a right to redeem, of which fact the guardian was ignorant; 1 *Aik.* 130: money paid as rent to the defendant, who claimed to be the devisee of lands held by plaintiff as tenant, plaintiff being subsequently compelled to pay it to the heir; 5 *Man. & Ryl.* 64; 10 *Barn. &*

Cress. 234: paid by an executor or administrator, who supposes the estate he is administering solvent, for a debt against it, it subsequently appearing to be insolvent; 17 *Mass.* 380; 16 *Ind.* 160: moneys received by the defendants, assignees of a bankrupt, from the sheriff, by him collected on an execution against the bankrupt, in the plaintiff's favor; 1 *Dowl. & Ry.* 482: paid to the defendant, a collector of taxes, who had advertised the lands of several non-residents for sale, and received the whole expense from the plaintiff, who was one of them; 2 *Day*, 369: where on settlement of accounts, a note was given by mistake for more than the true balance, the excess was held money received to plaintiff's use, although the note was unpaid; 1 *Greenl.* 152: money by mistake paid by the plaintiff to the defendant, an agent, who had before notice of the mistake carried it to the credit of his principal upon his books; 3 *Maule & Selw.* 344. To protect the agent against the payment, it must appear that he received the money for his principal, and had actually paid it to him before notice of the mistake; 1 *Taunt.* 359; 5 *id.* 815: money received by the defendant as the proceeds of plaintiff's goods taken by the defendant and others, notwithstanding the plaintiff had obtained a judgment for the taking of them against the other persons, such judgment not being satisfied; 2 *Hall*, 449: money obtained by any overreaching, false allegation, or fraudulent concealment; 4 *Mass.* 488; 13 *Serg. & Rawle*, 259: withheld contrary to equity; 17 *Mass.* 575: money obtained upon the note of defendant, upon which he had forged the endorsers' names, notwithstanding the note has not become payable; 15 *Mass.* 75: received upon a purchase of an article sold by defendant, which he fails or refuses to deliver; 1 *Str.* 407: received under fraudulent pretenses from the plaintiff for a quitclaim deed of lands; 2 *Day*, 252: or for a pretended claim for bounty land, by one who falsely represented himself entitled to it; *Id.* 337: money received by a partnership on the false representation of one of its members in a partnership transaction; 2 *Barn. & Ald.* 795: received by the defendants upon a check lost by plaintiff and purchased by defendants for value but under circumstances to excite suspicion; 5 *Dowl. & Ry.* 324; 6 *id.* 455; 4 *Barn. & Cress.* 330; 2 *Car. & Payne*, 11: where the defendant paid the plaintiff bills of a broken bank, with reasonable grounds to suspect they were worthless; 6 *Mass.* 182: money received by the defendants from plaintiffs upon a check, the defendants at the time knowing that it was post-dated and the drawer insolvent, and that the plaintiff had none of his funds, but expected to receive some soon; 1 *Brod. &*

Bing. 289; *Gow*, 123: where the defendant fraudulently induced the plaintiff to sell goods to an irresponsible person, and then upon the sale of them by him obtained the money received for them; 2 *Brod. & Bing.* 369; 3 *Saund.* 274: where the defendant, without giving value for them, has got possession of bank notes lost by plaintiff; 2 *Car. & Payne*, 176: money deposited by the plaintiff with the defendant for a particular purpose and misapplied; 2 *Bos. & Pul.* 277; 4 *Cowen*, 607: money fraudulently obtained by the defendant of the plaintiff, although entitled to it, if the right depends upon a question not of common law jurisdiction; 1 *Camp.* 124: money paid on an execution issued on a satisfied judgment; 15 *Wend.* 321; *S. P.* 22 *Ind.* 482: money paid by the plaintiff on the purchase at a constable's sale of a chattel interest in lands, the constable refusing to convey it; 19 *John.* 73: where the plaintiff was the consignee of certain goods of A as a collateral security, and the defendant, another creditor, subsequently took an assignment of them, and sold them and received their price; 1 *Camp.* 554: money received by the defendant to pay a bill of exchange to the plaintiff, but which he applied to pay his own debt; 17 *Mass.* 575; *Id.* 400: money paid by the maker of a note under an agreement that it should be endorsed upon it, the defendant not endorsing it, and then taking judgment for the full amount; 16 *Mass.* 306; *contra* 43 *Barb.* 315. Where the defendant has received the plaintiff's money, it is no defense to him that he has paid it out upon a forged order or receipt, nor that he has paid it upon a check which had been altered. 8 *Dowl. & Ryl.* 464; 5 *Barn. & Cress.* 750. And in all cases where money has been paid by the plaintiff to the defendant by mistake, notice of the mistake and demand of repayment, before bringing the action to recover it back, are unnecessary. 18 *John.* 485; see also 19 *N. Y. R.* 499; 26 *Barb.* 423; 27 *id.* 354.

In the following cases the action was not sustained: where plaintiff voluntarily paid an award made by arbitrators, although it was obtained by fraud; 8 *Mass.* 402; 12 *id.* 134; 1 *Day*, 130: money paid under a full knowledge of the facts, but under a mistake as to the law; 14 *Iowa*, 86; *Id.* 226; 24 *Cal.* 585; 5 *Taunt.* 143; 9 *Cowen*, 674; in the latter case the doctrine of payments by mistake is very fully examined: paid on a disputed claim, although the party paying expressly reserve his right; 1 *Day*, 130: or to compromise an action the party paying having a full knowledge of the facts and the means to prove them; 2 *Jac. & Walker*, 249: paid on a forged note, both parties being innocent in the transaction; 17 *Mass.* 1; 2 *Min.*

78: paid by an executor who had requested the defendant to purchase a note against the estate, when it appears that the amount paid exceeded the dividend to which the note would entitle the holder; 7 *Pick.* 46: against an agent for the price of goods sold by him, it appearing that he had not received the payment for them; 2 *Dall.* 242: money paid to redeem lands sold upon a void assessment, notwithstanding the plaintiff protested against its legality; 2 *Sand.* 475: paid by the drawee of a forged bill to an innocent holder; 3 *Coms.* 230; see 4 *id.* 147. But where upon a settlement of accounts between plaintiff and defendant, a third person computed the interest and without their knowledge compounded it, and the plaintiff brought his action for the excess of interest, it was held a mistake of fact, and the plaintiff recovered; 2 *Denio*, 107.

§ 310. Under the THIRD CLASS, money paid upon a consideration which happens to fail, are the following decisions: money paid the defendant on the sale of property the title of which turns out to be defective; 5 *Burr.* 2639; 5 *Pick.* 480: and this though the payment have been made in the note of a third person, this being deemed an equivalent to the payment of money; 3 *Cowen*, 272: where the thing contracted to be sold is not delivered; 1 *Str.* 407: where land contracted to be sold could not be found; 1 *Dal.* 428: money paid to the defendant on his contract to deliver a chattel, and the delivery is a condition precedent to the sale, when before the delivery the chattel is destroyed; 1 *Wend.* 58; see 25 *N. Y.* 272: paid by plaintiff as the price of hay sold by him for the defendant, and paid to him before payment by the purchaser or delivery, when the defendant's servant sent to deliver it is before delivery cheated out of it; 8 *Bing.* 86: obtained on a bill of exchange received by defendant in advance for goods which are not delivered; 4 *Maule & Selw.* 476: paid for goods which turn out to be of a different kind from those contracted for and of little value, the plaintiff returning them, and this though there be neither fraud nor warranty; 15 *Mass.* 319: paid for premium of an insurance when the risk never commenced; 3 *Burr.* 1237: where the premium on a policy is paid by a note to the satisfaction of the underwriters, and the insured is entitled to a return of the premium, although the note is not paid; 14 *Mass.* 121: money paid under an agreement which the defendant was unable to perform; 1 *Wend.* 58; 2 *Esp.* 639; 7, *Term.* 177: or which he does not perform; 8 *Barn. & Cress.* 575; 26 *Ill.* 396: and this whether the agreement be sealed or by parol; 1 *Caines*, 47: money paid by the plaintiff on a parol contract for land, or received by the defend-

ant on a note given him by the plaintiff on such contract, the contract being void by the statute of frauds; 15 *John*. 503: advanced to the defendant, a broker, to pay duties on goods, upon his representation that he would by their sale discharge his lien and leave a surplus, the sale being defeated; 5 *Taunt*. 446: money paid to defendant as a consideration for a service contracted to be performed, which he puts it out of his power to perform, or when he prevents the plaintiff from performing his part of the contract, and so defeats it; 7 *Cowen*, 24: money paid by the plaintiff, an endorser upon a judgment recovered against him on a note, where the holder, before the judgment, had discharged his prior endorser; 4 *Wend*. 360: money paid to defendant upon a security which turns out to be of no value, or different from what was intended, as upon a genuine note with a forged endorsement; 15 *Mass*. 75, 331: paid a bill broker on the discount of a bill which he did not endorse, it being forged, and the money having been paid over by him to the endorsee; 1 *Ry. & Mood*. 49: money paid on a subscription to support a minister where the fund was not so applied; 3 *Pick*. 322: paid for the future maintenance of a bastard child, who dies before the expense is incurred; 3 *Moore*, 211; 1 *Brool. & Bing*. 1; 25 *N. Y.* 289; see also 3 *John*. 335; 45 *Barb*. 610.

In the following cases the action was not sustained: for moneys paid for premium upon a void insurance, the action being brought after the risk was over; *Doug*. 468: money paid for the use of a patent which turned out not to be an original invention; 4 *Bos. & Pul*. 260: paid on a parol contract for lands, there being no default in the vendor; 9 *Cowen*, 46: money paid on an agreement to purchase lands where all the payments were not made according to the contract, and the land is sold to another; 4 *Barb*. 354: paid as the consideration of a quit-claim deed on the title failing, there being neither fraud nor warranty; 1 *Mass*. 65: so though there be a covenant that the grantee shall have it after grantor's death; 4 *Mass*. 135: paid an executor for lands of his testator sold under a license for the payment of debts, the lands having been recovered from the plaintiff by an older and better title; 4 *Greenl*. 101: paid by a judgment creditor to redeem land, he failing to pay the whole debt; 6 *Greenl*. 142: paid for lands purchased, afterward ascertained to be deficient in quantity, the relief being an equitable one; 3 *John*. 506: paid for goods delivered agreeably generally with the sample and contract, but miserable in quality, and wholly unfit for use, the proper remedy being upon the implied warranty; 2 *Camp*. 416: an

action by the payee against the maker of a note on the failure of its consideration, the giving of a note not being an equivalent to the payment of money, unless it be received as such in payment or discharge of a liability of the party sought to be charged; 1 *Wend.* 424.

§ 311. Under the FOURTH class, where money has been paid as a consideration for an agreement which is afterward rescinded, are the following cases: money paid by the plaintiff upon a conditional sale, or contract that is rescinded; 1 *Term.* 133; 1 *Caines*, 47; 12 *John.* 363: money paid by the plaintiff to the defendant in consideration of an act to be done by him, and which he fails to do; 3 *Pick.* 20: money paid on a contract void for want of power in the opposite party to contract; 7 *Mass.* 31: in consideration of a void bond; 2 *Bos. & Pul.* 467; see also 5 *John.* 85; 12 *id.* 274; 4 *Cow.* 249; 19 *Barb.* 222; 21 *id.* 26; 30 *id.* 20.

Where, however, a payment has been made upon a contract still open, and neither fulfilled or rescinded, the action will not lie; *Doug.* 23; 7 *East*, 274: nor upon one which has been in part executed; 1 *N. H.* 17: and generally where one who seeks to recover money paid under a void or rescinded contract, he must show that he in fact paid money; 5 *Barb.* 319.

§ 312. Under the FIFTH class, moneys received in pursuance of a void authority, it is held that money paid by the plaintiff to the defendant under the sentence of a court having no jurisdiction, may be recovered; *Id. Raym.* 742; *Cowp.* 419; 4 *Cowen*, 454. So if paid to the innocent second endorsee of a certificate of deposit which had been stolen, and an endorsement of the payee forged; 1 *Hill*, 295: or if paid to the holder of a draft payable to the order of one whose endorsement is forged; 1 *Hill*, 287; 2 *Sand.* 431; 1 *Coms.* 113. The action was sustained against a United States marshal to whom the plaintiff, a surety upon a recognizance estreated by the United States circuit court, had voluntarily paid the penalty, and afterward, when the court adjudged the recognizance void, before the money had been paid over by the marshal, demanded it of him; 1 *Barb.* 355.

In the following cases the action was not sustained; against one having money belonging to an estate, who paid it to one having the probate of a forged will; 3 *Term.* 125: against a tax gatherer for a tax erroneously paid, but which he has paid over; 4 *Term.* 553; *Cowp.* 66: against a public officer who has collected money by order of his official superiors; 1 *John.* 515: money paid with knowledge of the material facts, in satisfaction of a claim which could not be enforced at law; 4 *Pick.* 114: paid on an illegal distress, the remedy

being for the wrongful act; 2 *N. H.* 461: by the drawee of a forged bill against an innocent endorsee to whom he paid the amount; 3 *Burr.* 1354; 6 *Taunt.* 76.

§ 313. Under the SIXTH CLASS, moneys obtained from the plaintiff by *extortion, imposition, or taking an undue advantage of his situation*, are the following: paid by the plaintiff to officers of the revenue to discharge goods which he seized for want of a permit, when in fact they had one; 4 *Term*, 485: fees unduly extorted from the master of the plaintiff's vessel by the defendant, a custom-house officer; *Cowp.* 805: tonnage duty or light money unlawfully demanded by a collector of the customs and paid for a clearance; 9 *John.* 201: unlawful fees required by a district clerk of the United States court in a suit relating to the wrongful seizure of a vessel before he would give an order for its delivery; 9 *John.* 370: money demanded for illegal fees and paid to a public officer; 4 *Dowl. & Ry.* 283; 2 *Barn. & Cress.* 729; 2 *Barn. & Ald.* 562; 1 *Chitty*, 295: excessive tolls taken from plaintiff; 2 *Barn. & Ald.* 206; 4 *Barn. & Cress.* 200: paid to liberate a raft of timber detained to exact illegal tolls; 7 *Greenl.* 134: money received by the defendant a landlord, upon a distress for his whole rent, when a part had been paid by the tenant for the property tax, upon an agreement that it should be credited on account of the rent; 1 *Marle & Sel.* 609: paid under terror of a threatened distress which is unauthorized; 1 *Taunt.* 359: paid for irregular charges made by a landlord against his tenant in consideration of a forbearance to distrain for rent; 5 *Bing.* 37: paid the defendant to whom goods were pledged, who refused to deliver them without receiving more than was due upon them; 2 *Str.* 915: paid an insurance company on its refusing to transfer to plaintiff certain shares purchased by him, until he had paid certain notes it held against a former insolvent holder of the stock; 3 *John. Cas.* 238: paid as the only means of recovering possession of property to which the plaintiff was entitled; 9 *Dowl. & Ryl.* 889; 7 *Barn. & Cress.* 73: where defendant had obtained possession of the plaintiff's tickets to a masquerade, an action for money had and received was maintained against him, on the presumption that he had sold them and received the money for them; *Doug.* 131; see also 2 *Kern.* 99.

In the following cases an action will not lie: for money voluntarily paid on a disputed claim, though the party reserve his right; 1 *Day*, 130: paid under compulsion of legal process, the plaintiff before payment knowing the cause of action, and there being no fraud, although it afterward be discovered that the money was not due; 2

Moore & Scott, 811; 9 *Bing.* 644: paid voluntarily for toll of which the law would not compel the repayment; 2 *Cowen*, 419: paid for forbearance to sue; 2 *Nott & McCord*, 133: paid voluntarily when the defendant may with a good conscience retain it, although he could not recover it at law; 1 *Dal.* 147: paid to the defendant to release plaintiff's cattle which he had impounded damage feasant, the right to impound them being disputed; *Cowp.* 414: paid by the owner of lands sold by loan officers, to obtain a release from the defendant who had purchased them agreeing to buy as trustee for the owner; 14 *John.* 358: an action by one who had distrained goods and delivered them to defendant on his promise to pay the rent; 4 *Term.* 687.

§ 314. Under the SEVENTH class, where money has been embezzled, or stolen by a man's clerk or servant, or obtained from him by cheating at play, a nurse who on the death of the person she attended embezzled his money, was held to have received it to the use of his estate; *Bull. N. P.* 130: so where a carrier, employed to carry the plaintiff's money, or a clerk, lost it at a gaming table, a recovery was had against the winner; 17 *Mass.* 560; 2 *Keyes*, 198.

§ 315. Under the EIGHTH class, where money has been recovered that has been paid upon a judgment or decree, which after the payment has been reversed for error, the following cases are found: 6 *Cowen*, 297; 10 *Wend.* 354; 24 *Wend.* 32; 5 *Paige*, 539; 1 *Har. & John.* 405; 18 *Cal.* 275; 29 *Barb.* 87: where the plaintiff held a bottomry bond for money lent, and after a capture and condemnation of the vessel, the condemnation was reversed and a compensation awarded and paid, the action was sustained against the obligor; 3 *Mass.* 443.

In the following cases, the action was NOT sustained: to recover money paid on a judgment of an inferior court on the ground that it was unjustly recovered; 8 *John.* 470; 2 *Cowen*, 428; 1 *N. H.* 33: or that a good defense has since been discovered; 9 *John.* 232: or that the party paying had a good defense which he neglected to interpose; 9 *John.* 244; 2 *Esp.* 546: money paid under the erroneous sentence of a foreign court; 1 *Yeates*, 533: paid on a tax overcharged by the assessors; 6 *Pick.* 98: to recover back any part of money paid a sheriff on a forfeited recognizance, where after payment it is mitigated by a court not authorized, to a small sum, which only the sheriff pays, and then agrees to pay plaintiff the balance; 7 *Barn. & Cress.* 293; 2 *Car. & Payne*, 621: against defendant, a creditor of B, to whom B assigns a judgment against the plaintiff to apply on his debt, which the plaintiff pays the defendant, and the judgment

is afterward reversed; B having become insolvent; 2 *Day*, 153: money paid in satisfaction of a valid judgment although upon an execution which is irregular; 6 *Barb.* 308.

§ 316. Under the NINTH class, to recover back moneys paid upon any contract declared void by the common law or by statute, are the following cases: money paid to compound a *qui tam* action; 8 *East*, 378: or to a magistrate for the use of the poor to avoid a prosecution for a misdemeanor; 9 *East*, 49: paid a lottery office keeper for illegal insurance of lottery tickets; 2 *Bl.* 1073; 1 *H. Bl.* 65; *Cowp.* 790: or expended by the plaintiff's clerk without his knowledge for such a purpose; *Cowp.* 197: paid to a stakeholder on an unlawful wager; 3 *Denio*, 103, 107; 1 *Coms.* 392: paid to induce a creditor to sign a bankrupt's certificate; *Doug.* 696, 3d ed. note 3: to withdraw opposition to an insolvent's or bankrupt's discharge; 2 *John.* 386; 3 *Selden*, 176: paid on a contract which is *malum prohibitum*, if the action be founded on its disaffirmance; 8 *Cowen*, 20: or on an illegal executory contract; see 21 *N. Y.* 490; 8 *Barb.* 233; 20 *id.* 429; 8 *Barn. & Cress.* 221: paid by a debtor for interest beyond the legal rate: 29 *John.* 290; 41 *Barb.* 560; 11 *Mass.* 368, 376; 13 *id.* 104; 9 *id.* 38; 2 *Aik.* 303.

In the following cases, the action does not lie: money voluntarily paid by plaintiff to obtain the performance of an agreement for which he has no legal remedy, as a parol agreement concerning lands; 4 *John.* 240: paid for a pretended title to lands of which the vendor is not in possession; 1 *Mass.* 65: paid in advance on a contract with defendant to deliver in 60 days, 100 shares of stock which he then owns, on the ground that at the time of delivery he had but 40 shares; 7 *Cowen*, 24: paid a district attorney for discontinuing a criminal prosecution; 2 *Conn.* 209: paid on an illegal contract for maintenance; 6 *Cowen*, 431: under the English statutes prohibiting unlawful wagers, where moneys are deposited with a stakeholder and by him paid over to the winner with the loser's consent, they cannot be recovered. The statutes of this state, however, while declaring all contracts in violation of the laws against gaming, raffling and lotteries void, authorize the recovery of moneys staked or raffled for, in the hands of a stakeholder, or of whomsoever they may be, and whether paid over by the stakeholder or not; 1 *R. S.* 652, 665; 2 *id.* (*Banks' 5th ed.*) 924 and 929, §§ 9 and 25.

[§ 316a.] Other cases where the action has been sustained are: where the owner of real estate sold for taxes, but regularly redeemed, buys it of the purchaser, who tells him he has received a conveyance

which has become absolute; 4 *Sel.* 331: for costs illegally demanded by an attorney; 18 *Wend.* 586: by a surety who has paid a judgment obtained against him in ignorance of the fact that the creditor has discharged a security to which the surety might be subrogated; 16 *N. Y.* 336: where money was deposited with the defendant on an agreement to endorse it on a contract with a third person, when the plaintiff obtained an assignment thereof, there being no agreement by the plaintiff to procure the assignment; 22 *N. Y.* 242; see 39 *Barb.* 136: where money was paid on an award obtained on an *ex parte* hearing, upon a fictitious and groundless claim; 33 *N. Y.* 9: where a claim about to be enforced for a penalty for running a toll-gate was compromised on the mistaken idea that the law gave a penalty; 10 *Barb.* 436: for money paid for spurious stock, both parties supposing it genuine; 19 *N. Y.* 499: for bonds sold by an agent, although their issue was unauthorized; 23 *Barb.* 425: where judgment is obtained by default, the defendant not being credited with payments; 26 *Barb.* 463; but overruled and the contrary held in 43 *Barb.* 315: for money paid to an overseer of highways, which belongs to the commissioners, and for which they bring suit; 40 *Barb.* 374: for over payments by mutual mistake or erroneous calculations; 42 *Barb.* 461: against one of a firm who, on dissolution, has assigned all his interest in the assets to his copartners, but afterward collects debts; 2 *Bosw.* 360; 3 *id.* 450: where property is sold for taxes that have been paid, or are otherwise uncollectable; 9 *Iowa*, 259; 25 *Ill.* 411; 13 *Wis.* 611: where a party who has received money for doing an act puts it out of his power to perform; 25 *Ill.* 214; 16 *id.* 492: where an illegal tax is paid on demand; 7 *Minn.* 267: for money paid on void certificates, supposed by both to be valid; 14 *Wis.* 241: for property sold on process against other parties; 28 *Ill.* 135.

[§ 316b.] Other instances where the action has been held not to lie, are: where money is voluntarily paid to a person who would be authorized to receive it if collectable, upon a claim of right, where there is no misrepresentation of fact, nor any mistake; 2 *Kern.* 308; 3 *Barb.* 369; 16 *Ind.* 29; 25 *id.* 261; 1 *Oregon*, 292: where a surety has paid a judgment which the principal has appealed and reversed, and the surety brings his action against the party, not against his principal; 20 *N. Y.* 306: for money paid to compromise a supposed felony, or on any other agreement forbidden by and against the policy of the law; 15 *Barb.* 541; see also 20 *Barb.* 429; 35 *id.* 236; in a case of mere agency for the transmission of money, where the action is by the party to whom it is sent; 16 *Barb.* 561; see also on the same prin-

ciple, 38 *id.* 262: by one who has voluntarily performed an agreement claimed to be void by the statute of frauds; 16 *Barb.* 645; 17 *id.* 471: by a party wholly in default, to recover money paid by him in part performance, but who afterwards breaks the contract and refuses to go on with it; 9 *Coven.* 46; 3 *Coms.* 88; 42 *Barb.* 58: for illegal taxes voluntarily paid; 17 *Ind.* 326: but if to a collector on demand or under protest, then it may be; 20 *Ind.* 301; 7 *Minn.* 267; 23 *Cal.* 111; see 25 *Ind.* 261.

§ 317. V. FOR MONEY PAID FOR DEFENDANT. Here, to maintain the action, money or something which has been accepted as its equivalent, must have been actually expended *for the defendant* at his request, or under circumstances from which the law will imply a request. As where the plaintiff is so situated in relation to the defendant that he is called upon to make a payment of money for him. The case of money paid by the plaintiff as surety for the defendant, or as maker or endorser of a note for his accommodation, is a common one under the rules.¹ Also where an agent pays a judgment against himself for a lawful act done in obedience to his principal's instructions;² and where the plaintiff is one of several co-sureties for a third person, and he pays the obligation, he may recover the money paid from the principal debtor; or, without showing the inability of the principal, may recover from each of his co-sureties; or, if they be dead, from their legal representatives, their respective shares of the sum paid.³

§ 318. Wherever the relation of surety exists, whether the surety became so by actual contract or the operation of law, if he is compelled to pay the debt which his principal or principals ought to pay, he may bring his action against him or them for the money paid;⁴ and this notwithstanding he paid it upon a bond which could not have been enforced against the principal, if the payment be made without fraud or negligence.⁵ Thus, one who is bail for another can recover all the necessary costs and expenses to which he has been put by reason of it, including the expense of sending for his principal to surrender him; but not of a suit improperly defended,⁶ nor for trouble and loss of time in going to a place to become the bail.⁷

¹ Kirby, 137. 8 John. 249. 5 Serg. & Rawle, 8. 4 Pick. 283. 1 Wash T. 108. 27 *id.* 474.

² 38 Barb. 124.

³ 3 N. H. 270. 17 Mass. 464. 2 Sel. 33. 11 Wend. 385. 3 Kern. 59.

⁴ 4 Hill, 345. 1 Seld. 171. 14 Barb. 32.

⁵ 14 Mass. 455.

⁶ 5 Esp. 171. 2 Wend. 481. 24 Barb. 546. 3 *id.* 634.

⁷ 1 Car. & Payne, 434.

And in case of the principal's death, the action lies against his estate.¹ If a surety pays a judgment which is reversed on error brought by his principal, the surety can recover for what he has paid, of him, but not of the other party to whom he paid it.² So where a defendant in execution escapes from the sheriff or constable, by reason of which the latter is compelled to pay the debt; or where the plaintiff's goods, being on the premises of defendant with his consent, are distrained for his debt, and the plaintiff is compelled to pay the rent to release them, or to buy them upon the sale, the action will lie.³ But in the latter case, if the goods were not redeemed or purchased by the plaintiff, but sold to another, the action would not be for money paid. Where A, at the request of B, defends an action in which the latter is concerned and may be benefited by the event, and a judgment is obtained against A, he can recover the expenses of the defense from B.⁴

Some cases hold that interest cannot be recovered on money paid in the absence of an agreement to pay it;⁵ but these were overruled in *Pease v. Barber*;⁶ and subsequent cases give interest in such cases.⁷

§ 319. The money must, or something which is accepted as an equivalent, be paid by the surety and in discharge of the indebtedness of the principal. This may be by the surety's promissory note,⁸ or by land conveyed to the creditor and accepted in discharge of the debt.⁹ It is not sufficient that he has given his bond for the debt,¹⁰ nor that he is imprisoned in execution upon it.¹¹ If the surety extinguishes the debt by paying only one-half the amount, he is entitled to recover no more than he actually paid, either of his principal or his co-sureties;¹² and he cannot recover the costs of a suit against him, as surety, from his co-sureties.¹³

§ 320. The payment must also be made by the plaintiff, at the request of the defendant, either express or implied.¹⁴ If, therefore, a sheriff voluntarily suffers an escape, or a constable suffers an exe-

¹ 32 Barb. 587.

² 20 N. Y. 306.

³ 7 Wend. 119.

⁴ 1 Esp. 162.

⁵ 3 Starkie, 132. 1 Bos. & Pul. 307. 2 51.
id. 467, 472. 2 Burr. 1005. 5 Car. & P. 498.

⁶ 3 Caines, 266.

⁷ 15 N. Y. 397, and refs.

⁸ 3 N. H. 366. 4 Pick. 444. 8 John. 202.

2 Esp. 571. 5 Barb. 319. 38 id. 124. See 3 Ind. 47. 34 Ill. 9.

⁹ 7 Cowen, 662. 2 Wend. 481.

¹⁰ 8 John. 202. 3 East. 169. 2 B. & Ald.

¹¹ 8 John. 249, *see* *vid.* 38 Barb. 124.

¹² 2 Wend. 481. 6 Ind. 357.

¹³ 6 Ind. 357.

¹⁴ 5 Bosw. 579. 3 Ind. 284.

cution to expire in his hands, and then, without the defendant's request, pays the debt, he cannot recover the money paid.¹ So if a collector of taxes pay over my tax without demanding it of me, or if the endorsee of a bill of exchange pay the amount before a demand of the acceptor,² the payment is a voluntary one. In these cases, however, if the defendant requests the payment to be made, or afterward promises to pay the money, the action will lie;³ and, the request furnishing the foundation of the claim, where one becomes a surety at the request of another surety, and the latter pays the debt, he cannot resort to the former for a contribution.⁴ If property which has been lost, or is afloat, or an estray is secured, stored, or otherwise cared for at an expense, the one who does it may recover for the money paid, the law implying a request and promise from the owner.⁵

§ 321. Where one was employed as the agent of certain others to purchase for them a piece of land and take the conveyance to himself, and a third person, at the request of the principals, became surety for the agent in a promissory note for the purchase money, which the surety paid, it was held that the surety alone might have his action against the principals for the money thus paid.⁶ So where two, jointly interested in a transaction, execute a bond with A as surety, and B, at the request of one of the principals, pays the bond, B has his action against the principals, but cannot recover against the surety, as the request of the principals did not enure as his request.⁷

§ 322. The action lies by an endorsee against his endorser or the maker for money paid on a judgment obtained against the former by the holder of the note;⁸ but a *joint* action against the *separate* endorsers will not lie.⁹ If a joint action is brought, it must be, not for money paid, but on the note itself. A *prior* endorser cannot recover against a subsequent one even on verbal proof that the latter agreed to pay the note if the maker did not.¹⁰ So the endorsee may have an action for a payment made by him upon the note, although it is not in full,¹¹ and upon a second payment he may have another

¹ 3 John. 434. 8 id. 436. 8 East. 171. ⁷ 5 John. 176.

² 10 John. 361. 2 John. Cas. 75.

⁸ 2 Wend. 481. 16 Barb. 177. 9 id. 506.

³ 5 Bosw. 579. 10 John. 361. Id. 404. 1 Bosw. 431.

14 Ind. 311.

⁹ 16 Barb. 177.

⁴ 12 Mass. 297. 2 Esp. 478. 2 Story on Cont. § 886.

¹⁰ 1 Bosw. 431.

⁵ 42 Barb. 368.

¹¹ 20 John. 367. 2 Wend. 369. 8 Barb. 634.

⁶ 5 Greenl. 504.

action.¹ But where two persons make and exchange notes, neither can maintain an action against the other for money paid on his own note.²

§ 323. If a contract, within the statute of frauds, be performed wholly or partly by one party, and the other refuses to perform it on his part, the action may be maintained by the party performing, to recover the money he has expended in the execution of the contract on his part;³ but if he who has performed in part breaks the agreement, for which breach it is rescinded, he cannot recover what he has paid.⁴

§ 324. It also lies where one of several persons pays a judgment or other debt against them in an action upon contract for a contribution against each of the others; but not if the recovery was for a *tort*.⁵ But it was held, that where the recovery was for an injury sustained by the negligence of the defendants' servants, neither party being present, that an action for contribution would lie.⁶ If, however, in the former case there was an agreement between these persons prior to or contemporaneous with the creation of the obligation, by which it was agreed that one should be indemnified against loss, he cannot be made by the other to contribute.⁷ If one is discharged from liability, as by a bankrupt discharge, his liability to make contribution ceases.⁸ It makes no difference in the liability that the sureties become so without any communication with each other.⁹ The proportion of each one's contribution is calculated according to the whole number of sureties, so that if one is insolvent, the others contribute their own share only, and do not have to make up that of the insolvent.¹⁰

§ 325. One joint contractor who pays money for another on a mere equitable claim capable of being enforced only in a court of equity, may maintain the action against his co-contractor,¹¹ and where several are liable for work done, and a payment is made to the creditor by a third person at the request of one of the debtors, the action lies against all.¹² So where several persons subscribed money for running a stage coach, and appointed an agent to carry out their plan, who advanced his money for the purpose, it was held that he

¹ 6 Wend. 284.

² 3 Den. 187.

³ 5 Mass. 133. 6 Seld. 232 and refs.

⁴ 42 Barb. 58.

⁵ 8 Term, 186. 2 John. Ch. 131. 1 Bibb, 502. 33 Barb. 354. 20 Cal. 130.

⁶ 2 Car. & P. 417.

⁷ 2 Kern. 462.

⁸ 3 Kern. 59. See 26 Ill. 50.

⁹ 2 Seld. 33.

¹⁰ 2 Story on Con. § 885.

¹¹ 6 Taunt. 289. 1 Marsh. 603.

¹² 11 Wend. 87. 2 Bosw. 516.

might maintain an action against a subscriber for the amount of his subscription.¹ But if one of two joint agents is imposed upon, and in consequence pays money to a wrong person, and is afterward obliged to pay it over again to the person entitled to receive it, he cannot recover from his co-agent his share of the money paid.²

§ 326. If one of two joint contractors, upon a breach by them of their engagement, without the consent of the other, agrees with their creditor to submit the amount of damages to arbitration, and then pays the award, he may recover from the other contractor his share of the payment so made.³

§ 327. Where a wharfinger received goods consigned to A, and B by mistake, supposing them his own, takes them and converts them to his own use, in consequence whereof the wharfinger pays the value of the goods to A, it was held that an action for money paid would not lie against B; that it should have been for the conversion.⁴ But in a subsequent case, where a carrier, by mistake, delivered to B goods consigned to and belonging to A, and B appropriated the goods, on the carrier paying A their value, it was held he might maintain his action against B.⁵

§ 328. The action lies by a stranger against the defendant for money paid for necessities furnished to, or support necessarily provided for one whom the defendant is under a legal obligation to maintain.⁶ Or where the defendant goes abroad, leaving a wife who dies in his absence, and a third person voluntarily pays the expenses of her funeral, suitable to her husband's rank and fortune, though without his knowledge or assent.⁷

§ 329. Where money is paid for defendant at his request, it is no defense to the action that the defendant lost the benefit of the payment in consequence of the plaintiff withholding the evidence of it until he had been indemnified by the defendant, who refused to pay him.⁸

§ 330. The action will not lie for money paid on an illegal transaction;⁹ and in all cases of partnership in such transactions, neither partner can recover back money paid for the other, unless he can sus-

¹ 5 Pick. 228.

² Chit on Cont. 181.

³ 4 Moore, 340.

⁴ 4 Camp. 81.

⁵ 4 Taunt. 189. Approved 9 Barb. 477, 481.

⁶ 5 Wend. 558.

⁷ 1 H. Bl. 90. 3 Camp. 298. 1 J. Scott (10 C. B.) 776. 12 id. 344. 1 Daly, 214.

⁸ 7 Mass. 268.

⁹ 4 Taunt. 165. 3 id. 6. 3 Barn. & Ald. 179. 2 Bos. & Pul. 371. Chit. on Con. 182. 4 Coms. 449. 28 Conn. 455.

tain his action without any aid from the illegal transaction.¹ So, money advanced by one to another with a knowledge and intent that it is to be applied in furtherance of an illegal purpose, cannot, after it is so applied, be recovered.² If one person connives with another to receive from him money belonging to a third person, he is liable to the owner in this action.³ Mere knowledge that the money advanced is to be used for an illegal purpose is no defense; it must be *intended* to be so used.⁴

[§ 330a.] There is a class of cases where a person who has laid out money for a particular object is allowed to recover it in an action for money paid, from one who has prevented the enjoyment or accomplishment of the object. As where the plaintiff had hired a room for a public meeting, and paid for its use, and the defendants, with the design of preventing the meeting, took possession of the room and passed resolutions opposed to the plaintiff's views, whereby the plaintiff was unable to hold the meeting proposed.⁵

[§ 330b.] Many of the principles applicable to cases of money paid, as well as many of the decisions relative thereto, apply equally to cases for money had and received. In the preceding sections under that head we have grouped many of them, and those sections should be referred to for principles and authorities under both of these heads.

§ 331. VI. FOR MONEY LENT. In order to maintain this action there must be an *actual loaning* of money or *its equivalent*. A loan of stock in the public funds will not sustain an allegation in a complaint for money lent,⁶ unless, possibly, the person receiving it has paid a debt with it.⁷ The money may be advanced, either to the defendant or to another person at the defendant's request, and on his promise to pay it;⁸ in either case, it is a loan to the defendant.⁹ Where money is advanced by a parent to his child, the presumption is that it is a gift, and not a loan.¹⁰ Foreign coin passing as money is regarded as lawful money for the purposes of this action, and proof of its payment will sustain a complaint for the loan of lawful money.¹¹ A loan by one person to another is not to be inferred

¹ 3 Taunt. 11. 2 Marsh. 542. 7 Taunt. 246. 22 Barb. 82. 35 id. 236.

² 2 Stark. Ev. (3d Am. ed.) 104, 105.

³ 9 Cowen, 320. 17 Barb. 15.

⁴ 4 Kern. 162.

⁵ 10 Abbott, 222.

⁶ 5 Burr. 2589. 2 W. Bl. 684

⁷ 11 John. 464, 471.

⁸ 1 Burr. 371. 2 W. Bl. 872.

⁹ 1 Vent. 311. 2 id. 36.

¹⁰ 4 Barn. & Cress. 71. 4 Pick. 21. See 23 Pa. 85. 32 id. 486. 8 Ind. 121. 18 Ill. 167.

¹¹ 5 Taunt. 228. 1 Marsh. 33.

from the bare fact of a delivery of money, though slight facts may raise the presumption.¹ It will be inferred to be either a payment or a loan, rather than as held in trust for the payor.²

§ 332. A loan may be presumed in some cases, where there is no direct evidence of the payment of money. Thus, an instrument in the following form, "I. O. U. £400," and signed by the defendant, although neither a promissory note or receipt, was received as evidence of money lent;³ and in another case, the action was sustained on an account stated.⁴ So, where it was proved that defendant gave his promissory note to the plaintiff which was lost.⁵ But an instrument in the following terms: "Nine months after the date hereof I promise to pay, &c., provided D. M. shall not return to England, or his death be duly certified," is no evidence of a loan; nor are the words, "value received with interest," in an instrument.⁶

§ 333. Where the money loaned is secured by a pledge, it may be recovered in an action for money lent, unless there be an express agreement to stand by the pledge only.⁷ Some of the English chancery cases have held that as every mortgage implied a personal debt, the action might be maintained against the mortgagor, although there were neither a bond nor a covenant for payment of the mortgage money.⁸ A contrary rule, however, was held at law; and it is well established that, in the absence of a covenant to pay, express or implied, no action lies upon a real or chattel mortgage, and the mortgagee is confined to the property alone from which to make his debt.⁹ In New York, by express statute, this rule is adopted in regard to mortgages on real estate.¹⁰

[§ 333a.] Whenever money is lent for the express purpose of enabling the borrower to do some act prohibited by law, such as playing at a prohibited game, the lender cannot recover it back in an action for money lent.¹¹ Mere knowledge of the illegal purpose is no defense. It must be a part of the contract that it shall be so used, or the lender must do some act beyond making the loan in aid of the unlawful design, and with knowledge thereof.¹²

¹ 1 Starkie, 385. 4 Denio, 108. 1 Coms. 377.

² 4 Nevada, 280.

³ 1 Dowl. & Ryl. 8. 1 Man. & G. 46. 12 Ad. & E. 641.

⁴ 4 Car. & Payne, 324.

⁵ 1 Hayw. 420.

⁶ 1 Tyr. 21. 1 C. & J. 162.

⁷ 2 Str. 919. See however the references in the next two notes.

⁸ 3 P. Wms. 360, 361. 2 Atk. 424.

⁹ Cro. Jac. 281. 2 Mod. 36. 6 Blackf. 162. 7 Watts, 360. 2 Mumf. 337. 10 John. 57. 3 Coms. 264. 14 Barb. 242. 11 Mass. 26, 34. 4 Cal. 294.

¹⁰ 1 R. S. 738, §§ 139, 140. 3 id. (Banks' 5th ed.) pp. 29, 30, §§ 159, 160.

¹¹ 3 Mees. & W. 434. 1 Horn. & H. 146.

¹² 4 Kern. 162.

§ 334. VII. FOR USE AND OCCUPATION of lands, houses, rooms or other real property. A statute of New York provides that a "landlord may recover in an *action on the case*, a reasonable satisfaction for the use and occupation of any lands or tenements by any person under any agreement not made by deed; and if any parol demise or other agreement not being by deed (i. e. under seal), by which a certain rent is reserved shall appear in evidence on the trial of any such action, the plaintiff shall not on that account be debarred from a recovery, but make use thereof as evidence of the amount of the damages to be recovered."¹ This *action on the case* is abrogated by the Code of Procedure; but all rights of action secured by the existing laws may be prosecuted by "civil action."²

§ 335. The action is founded upon contract, and unless there is a contract, express or implied, between the parties, it cannot be maintained.³ There must be a lease or evidence showing the relation of landlord and tenant;⁴ and therefore when the defendant enters on the premises under an agreement to purchase, the action will not lie.⁵ But if the agreement is by parol, and therefore void by the statute of frauds, and the purchaser enters into possession, and remains for a year, the action will lie against him.⁶ But wherever the defendant occupies by permission of the plaintiff, whether there be any stipulation as to the rent or not, the action lies to recover the reasonable compensation implied by law.⁷ And in such a case the defendant will not be permitted to question the plaintiff's title.⁸ If the occupation was not by the landlord's permission, his remedy is not for the use, but for the wrong.⁹ If a void lease is executed, and possession is not taken under it, no action can be maintained.¹⁰ In the absence of any especial agreement, the rent is not due till the expiration of the term.¹¹

§ 336. Where the defendant occupies under a lease or permission

¹ 1 R. S. 748, § 26. 3 id. (Banks' 5th ed.) ² 25 Barb. 243. 3 Wend. 219. 3 Mich. 37, § 20. 566.

³ Code, § 468.

⁴ 1 Term R. 387. Chitty on Con. 107. ⁵ 29 Barb. 171. 25 id. 243. 13 Iowa, 191. 16 Ill. 106.
⁶ John. 46. 25 Barb. 243. 1 Edm. Sel. ⁷ 15 N. Y. R. 327 and refs. 30 How. Cases, 223. 5 Cal. 222. 6 Ind. 412. 23 Pr. R. 129 and refs.. 5 Seld. 45. Infra, id. 114. 15 Ill. 61. 16 id. 24. § 339. 32 Ill. 151. 33 id. 453. 3 Greene, Iowa, 502.

⁷ Har. & John. 251. 13 John. 489. ⁸ 1 Esp. Dig. (Gould's ed.) 56 to 62. 5 9 Minn. 190. Cal. 222.

⁹ 6 John. 46. 13 id. 489. 31 Barb. 286. 20 id. 509. 13 Iowa, 191. 14 id. 527. 10 ¹⁰ 33 Barb. 142.

Ind. 329. 16 Ill. 26. Id. 24. Id. 145. 6 ¹¹ 27 Mo. 128.
Ind. 412. 17 id. 509.

from the landlord, although he may not be the immediate lessee, but may hold as his assignee, the law implies a contract from him to pay the landlord for the use and occupation of the premises. Thus, if A agree to let lands to B, and B permits C to occupy them, A may recover against C for their use.¹ An assignee for the benefit of creditors who occupies them, is liable for rent until he surrenders to the landlord.² His entry, however, will not make him liable if it is merely to take possession of the assigned goods, without any act manifesting an intent to take possession of the term.³ If, however, the premises are sublet only, the landlord cannot recover against under-tenant.⁴ An assignee is liable only till he himself assigns, or as long as he is in possession.⁵ If he is assignee of a part of the premises, he pays his share only of the rent.⁶

[§ 336a.] If the landlord sells the land, or assigns the lease and rents to become due, the assignee has generally the same rights as the original landlord.⁷ The same result follows in case of the landlord's death. Those who succeed him have the rents.⁸ If any rent is due at his decease, it goes to his representatives; if not then due it passes as real estate to his heirs, or as devised by his will.⁹

§ 337. The action lies where there is a sealed agreement to *give* a lease, and the defendant enters and occupies. Here the tenancy is not by the deed, for that is only executory and a parol demise is implied.

§ 338. It also lies where a tenant holds over his term, the law implying a renovation of the contract for another year at the same price.¹⁰ And as the tenancy in some cases will continue until after a notice by one of the parties to the other, a brief synopsis of the rules in relation to its termination is here given.

§ 339. When a lease is made providing for an annual rent, whether payable yearly or quarterly, but without limit to the period of holding, it is called a *general* letting, and the holding a *tenancy from*

¹ 4 Coms. 126. 20 Barb. 269. 21 id. 14 Barb. 654. 21 id. 646. 2 Wend. 646. 6 Bosw. 612. 30 N. Y. 453. 15 id. 507. 6 Duer, 494. 4 Coms. 126. 2 Hill, 374. See 43 Barb. 514. 18 id. 608. Supra, 274. (See as to the rule in Ill. 20 Ill. 101. § 149. 4 Mich. 106. 7 Cal. 450. 23 id. 21 id. 203). 1 Iowa, 111.

227.
² 3 Bosw. 308. 8 id. 135. See also 31 How. Pr. R. 383. 1 Hilton, 196. Id. 447.

³ 8 Bosw. 140.

⁴ 3 Coms. 286. 1 Hilton, 154. Id. 196. 2 id. 311.

⁵ 15 Cal. 287. 1 Hilton, 447.

⁶ 2 Barb. 643.

⁷ 21 N. Y. 280. 3 R. S. (Banks' 5th ed.) 36, § 15. See 3 Cal. 196.

⁸ 2 Bouv. Inst. 203. 3 Kent, 464. 2 R. S. 83, § 6. 3 id. (Banks' 5th ed.) 169.

⁹ 13 John. 240. 15 id. 505. 1 Daly, 419. 1 Cowen, 349. 1 Denio, 113. Infra, § 340. 28 Ill. 174.

year to year. This tenancy exists also where a tenant, either by the express or the implied permission of his landlord, continues to occupy lands after the term for which they were leased has expired.¹ But the holding over, in such a case, must be continued for such a length of time after the expiration of the term, as to authorize the implication of assent on the part of the landlord to such continuance.² In either of these cases, under the statute of New York, neither party can terminate the lease but by giving notice of the intention to the other at least one month before the end of the current year;³ and if no notice is given, the landlord cannot compel the tenant to quit; and the tenant will be liable to the rent for the ensuing year, unless the landlord takes possession or lets it to another tenant.⁴ Where an action is brought for the rent against the tenant, whether by holding over or otherwise, he cannot defend himself on the ground that the landlord had no title.⁵ He may show that the one he had at the commencement of the lease has been determined by the act of the landlord, or by operation of law.⁶

§ 340. The tenancy from year to year is upon the terms of the old lease so far as they are applicable to a yearly holding, unless there appears some agreement to the contrary.⁷ But where the old rent was merely a ground rent and the landlord is entitled to the buildings erected by the tenant, the annual value of both the land and the buildings is the measure of damages.⁸ Either party, however, may show an express agreement to vary the rent.⁹

§ 341. If the premises are let for an unlawful purpose, as for prostitution, or if the landlord has notice they are used for that purpose, he cannot, in the one case, recover anything for the use of the premises, or in the other for anything after the notice.¹⁰

§ 342. In an action for use and occupation, it is not necessary to prove an express contract with the tenant when he took possession, to take the premises, an express reservation of rent, nor that the ten-

¹ 15 John. 505. 4 Cowen, 349. 4 Wend. 327. 17 Cal. 80.

² 11 Wend. 616.

³ 1 R. S. 745, §§ 7 to 9. 3 id. (Banks' 5th ed.) p. 35. 12 Barb. 481. 14 id. 253. 23 Ill. 174.

⁴ 13 John. 240, 297. 1 Denio, 113.

⁵ 13 John. 240. 5 Seld. 45. 45 Barb. 56. Supra, § 335. 2 Cal. 515. Id. 558. 7 Ind. 715. 5 Wis. 279. 31 Md. 492. 33 id. 592. 21 Ill. 165. 14 Iowa, 397. 8 Minn. 435.

⁶ 30 Mis. (1 Geo.) 513. 8 Cal. 592. 21 id. 309. 15 N. Y. 374. 9 Barb. 615. 22 Wend. 121. 2 id. 507. 8 Blackf. 350. 21 Ill. 165.

⁷ § 338, supra.

⁸ 15 John. 505.

⁹ 2 Wend. 507. 21 Cal. 120.

¹⁰ 1 Esp. 13. Ryan & Moody, 251. 20 Geo. 449. 2 R. S. 702, § 29. 3 id. (Banks' 5th ed.) 989, § 39.

ant has paid rent. Where the holding by permission is established, the right to a reasonable rent is implied; and if it appears that a certain rent was reserved, that will govern the recovery, as in other cases of express contracts.¹ And although there be a written agreement not under seal, upon which the premises were held, and the plaintiff in his complaint omits to mention it, and simply alleges that the defendant is indebted to him for the use and occupation of the premises, yet when the agreement is produced the rent reserved in it will fix the measure of damages; and the defendant is not at liberty to give evidence of the value of the use, to reduce the recovery below the stipulated rent.²

[§ 342*a*.] If, for any reason, a tenant has forfeited his lease, that forfeiture is not waived by the landlord's merely allowing the tenant to hold over without notice to quit.³

§ 343. Where there was an agreement to lease a house for five years, by leases to be executed, and the defendant entered and subsequently refused to accept the lease, the court held that the plaintiff might bring his action for the occupation and not upon the agreement; and that as it was not on that, the statute of frauds was no bar to it. It also held that the taking of the key of the house by the defendant without a continued occupation, was sufficient to warrant a recovery.⁴

§ 344. At common law, and in the absence of stipulations to the contrary, it is well settled that upon an express contract to pay rent, the loss of the premises by fire, or inundation, or external violence, will not exempt the party from his obligation to pay the rent.⁵ It has been questioned whether, if they are destroyed intermediate the execution of the lease and the commencement of the term, the claim for rent is not gone.⁶ In New York this is now in part changed by a statute which provides that "The lessees or occupants of any building which shall, without any fault or neglect on their part, be destroyed, or be so injured by the elements, or any other cause, as to be untenable and unfit for occupancy, shall not be liable or bound to pay rent to the lessors or owners thereof after such destruction or injury, unless otherwise expressly provided by written agreement or covenant, and the lessees or occupants may thereupon quit and sur-

¹ 2 Gill & John. 326. 15 N. Y. 374. 19 John. 205. 2 E. D. Smith, 364. Supra, § 335.

² 7 Wend. 109.

³ 28 Cal. 151.

⁴ 3 Wend. 219. 1 Hilton, 52.

⁵ 4 Kent, 466. 3 John. 44. 5 Barb. 601. 6 Seld. 479. Taylor's L. & T. 180.

⁶ 4 Cal. 339. 25 Ill. 109. 5 Har. 378. 4 Taunt. 45. 4 Wis. 468. 23 Ind. 114.

⁷ 6 Seld. 479, and cases cited, 487, 488.

render possession of the leasehold premises, and of the land so leased or occupied.¹

Independent, however, of this statute, if the premises are entirely destroyed, as where, not the ground itself and erections were rented, but only rooms in an upper story were demised, and the entire building was burned, so that the lessee could not occupy any of the premises leased to him, the lessee is discharged from his obligation to pay after that destruction.²

The action will not lie against a tenant holding over where proceedings are instituted under the statute to evict him ;³ nor where the title is in dispute between the plaintiff and defendant, the courts refusing in this manner to determine a question of title, the proper remedy being by ejectment.⁴ Nor where there has been no occupation by the defendant during the term for which the premises were leased, the action in such a case being not for use and occupation, but on the lease itself.⁵ An actual manual occupation, however, is not necessary. If the power to occupy is given by the landlord to the tenant, he may recover, as where, though there was no actual occupancy, the tenant had the key, and might have used the premises.⁶

It has been held that the above statute of New York applies only where the injury or destruction occurs after the lessee's entry, and not where it existed at the time of making the lease.⁷

[§ 344*a*.] An eviction is defined to be where there has been an obstruction to the beneficial enjoyment of the premises, and a diminution of the consideration of the contract by the acts of the landlord; or with his permission, or by paramount title, although these acts may not amount to a physical eviction,⁸ if they are so illegal and monstrous as to be equivalent to it.⁹

Under this rule it is a sufficient eviction that the landlord uses other parts of a house than those rented, as a house of prostitution, making it the resort, day and night, of lewd women and men, by whom there is a great deal of indecent noise and disturbance.¹⁰ That the landlord tears down a partition which separated the entrance to

¹ Sess. Laws 1860, ch. 345, p. 592, § 1.

⁷ 1 Daly, 485. 29 How. Pr. R. 259.

² 26 N. Y. 498. 12 Mees. & W. 79, 3 Ed. Ch. 315. 5 Ohio, 477.

⁸ 8 Cowen, 730. 1 Sand. 260. 35 Barb.

³ 1 Wend. 134. See 33 N. Y. 245.

523. 24 id. 178. 5 Hill, 52. 20 N. Y. 283. 18 id. 281. 31 id. 514. 9 Bosw. 57.

⁴ Woodf. Land. & T. 356.

⁹ 6 Bosw. 653.

⁵ 1 Denio, 37. 2 id. 84. 7 Barb. 201. 31 id. 345. 4 Coms. 217.

¹⁰ 8 Cowen, 727.

⁶ 34 New York, 284.

the tenant's room from a low grogshop, compelling him to pass through the latter;¹ that the landlord and his family intentionally disturbed the tenant's use and enjoyment of the premises by petty but constant annoyances, seriously injurious to his business, as well as destructive of the comfort of himself and family;² where the landlord refuses to permit an under-tenant to occupy,³ or forbids him to pay rent to the tenant;⁴ where dower is assigned in the premises (which is an eviction to the extent of one-third thereof):⁵ So, there is an eviction if a portion of premises are reserved, and the landlord afterward rents that portion to a tenant to be used for purposes which destroy the beneficial use of the other portion first leased.⁶

But it has been held that there is not eviction where other parts of the house are used for purpose of prostitution without the landlord's letting for that purpose, or his connivance and consent;⁷ where the landlord's act is a mere trespass;⁸ where he somewhat narrows the rooms on a claim that the true boundary required it, the tenant remaining in possession;⁹ where a third person lays claim to the premises;¹⁰ where there is a temporary nuisance which the tenant might remove; *e. g.*, a noxious smell produced by dead rats;¹¹ where the letting allows the owner to make repairs, and necessary ones are made, the landlord interfering with the possession for that purpose only;¹² where party stairs are removed by the lawful removal of the adjoining building;¹³ where a building had theretofore been used as a brothel, and the tenant was so annoyed by lewd persons calling there that he removed therefrom;¹⁴ or where the landlord retains possession of a small part of the premises for a very short time, without any intent to keep the tenants out of possession.¹⁵

[§ 344b.] If the tenant is evicted from the whole or any portion of the premises by the landlord, the whole rent ceases from that time till possession is restored;¹⁶ that then in arrear or due is not extinguished, even if it is payable in advance;¹⁷ if the eviction is by a stranger

¹ 35 Barb. 523.

² 1 Sand. 260.

³ 1 Hilton, 285.

⁴ 25 Ill. 587.

⁵ 11 Ohio N. S. 120.

⁶ 21 Ill. 479.

⁷ 4 Coms. 217.

⁸ 31 N. Y. 514. 31 Barb. 117. 1 Hilton, 149.

⁹ 1 How. Pr. R. 565.

¹⁰ 15 N. Y. 327.

¹¹ 25 Wend. 669.

¹² 42 Barb. 582. 13 Ind. 475.

¹³ 1 Wis. 250.

¹⁴ 1 Daly, 99.

¹⁵ 1 Daly, 311.

¹⁶ 8 Cowen, 730, 731. 1 Kern. 216. 25 Wend. 445. 24 id. 76. 4 id. 423. 20 N. Y. 281. 21 Ill. 470. 24 id. 279.

¹⁷ 3 Denio, 452. 4 Coms. 270. 3 E. D. Smith, 166. 9 Bosw. 70. 1 id. 171. 2 Hilton, 217.

under a paramount title of the whole premises, the tenant is discharged from the payment of rent from that time; if the eviction is from a part of the land only, the tenant is discharged for the proportionate share of the rent:¹ So, if the tenant acquires the paramount title to the whole of the lands, it is a bar to all subsequently accruing rent; if to a part only, then to the proper share thereof.² If the tenant continues in possession, although there is a technical eviction, he must pay rent in full.³ If he is evicted by a wrong doer he is still liable for rent to his landlord.⁴ Although the term is surrendered by the tenant, and accepted by the landlord, the previous rents are not discharged.⁵

Although the question has never, or but seldom if at all, been presented to the courts, yet it is doubtless true that the eviction, though partial only, may be of so essential a part of the premises as to justify the tenant in leaving them entirely, and thereby discharging himself for accruing rent under any circumstances.

[§ 344c.] There is no implied warranty that premises are tenantable,⁶ nor are agreements implied that either party shall make repairs.⁷ And yet it is held that if the tenant was ignorant of their condition, while the landlord knew they were unfit for occupation, and the tenant is compelled to quit them, no rent can be recovered.⁸ Also, that if it appears from the lease that the premises were to be used for a particular purpose, a covenant will be implied that they are suitable therefor.⁹

[§ 344d.] If the landlord agrees to make repairs, but does not, the tenant may either recover his damages for the omission, or, after demanding that the lessor make them, and his failure, may make them himself, and recover the expense thereof, even though they exceed what it would have cost the landlord, had he employed his own men.¹⁰ In making such repairs the tenant is not bound to use the same materials as were originally used. He is not to ignore and reject all improvements or new methods and materials. If he employs a competent mechanic, and uses suitable materials, and the work is seasonably and properly done, he is entitled to be reimbursed

¹ 8 Cowen, 730. 39 Barb. 59, and refs. ⁶ 7 Hill, 83. 37 Barb. 313. 1 Hilton, on pages 66 and 67. 21 Ill. 470. 24 id. 491.
279. 1 Kern. 216.

² 22 Wend. 171.

³ 20 N. Y. 281. 6 Bosw. 653.

⁴ 23 Cal. 227.

⁵ 4 Bosw. 192.

⁷ 24 Barb. 39. 4 Coms. 126. 3 Duer, 464. 2 Bosw. 127. 6 Cowen, 475. 4 E. D. Smith, 375. 1 Daly, 178. 23 Ind. 114.

⁸ 29 How. Pr. R. 289.

⁹ 31 Barb. 345.

¹⁰ 33 Barb. 401. 35 N. Y. 269.

what he has expended.¹ He cannot recover, however, for the interruption to his business while the repairs were being made, whether by himself or the lessor;² he may recover damages sustained by the loss of the use of those parts the landlord was bound to repair.³ In case of eviction by paramount title, from a part of the premises, the lessee cannot, in an action for the use, recoupe the value of the lease over and above the rent, the loss of profits in business, or other special damages.⁴ If the tenant takes possession, the lessor's breach of the agreement constitutes no defense for the rent reserved; a recoupment of the damages sustained is the only remedy.⁵ If a lease contains a right of re-entry, a sub-tenant may, in order to protect his possession, pay his rent to the original lessor.⁶

[§ 344e.] While, as we have seen,⁷ the action will not lie against a tenant holding over, where proceedings are instituted under the statute to evict him, in case there is no holding over, and the lessee is dispossessed for non-payment of rent, the lessor may have this action for use and occupation for the rent due prior to such removal.⁸

VIII. ON CONTRACTS ARISING IN THE COURSE OF AN ACTION BEFORE A JUSTICE OF THE PEACE. These will be examined in connection with the proceedings under which they arise.

§ 345. IX. ON BILLS OF EXCHANGE AND PROMISSORY NOTES. A bill of exchange is an open letter from one person styled the *drawer*, to another styled the *drawee*, requesting him to pay a certain sum to a third person, styled the *payee*, upon the drawer's account, at sight or at some specified time. It is what in common language is called an *order* or *draft*, for the payment of money. It may be made payable to the payee simply, in which case it is not negotiable, or to his order, when it is negotiable by his endorsement, or to him or bearer, when it is negotiable without endorsement. Its usual form is as follows:

Albany, June 1, 1868.

AT SIGHT (or "*at three days from sight*," or "*ten days from date*, or "*on the first of July next*,") PAY HORACE G. PRINDLE, (or, "*to the order of Horace G. Prindle*," or "*or bearer*") FIFTY DOLLARS, AT THE BANK OF CHENANGO, FOR VALUE RECEIVED. RICHARD ROE.

TO MR. JOHN DOE, MERCHANT, NORWICH.

It is sufficient that the payee be so described that, though not

¹ 33 Barb. 401.

² 42 Barb. 582. 4 E. D. Smith, 247.

³ 35 N. Y. 269.

⁴ 39 Barb. 59.

⁵ 31 Barb. 345.

⁶ 3 Seld. 528.

⁷ Supra, § 344.

⁸ 6 Hill, 507. 3 Denio, 452. 2 E. D. Smith, 121.

named, he may easily be identified, and that at the time the instrument is made.¹ The omission of the name of the drawee will not vitiate it. The acceptance supplies the defect, and is an admission that he was the person intended.²

§ 346. Bills drawn in one state upon a person living in another or in a foreign country, are denominated *foreign* bills; and such as are payable within the state where drawn, *inland* bills. Foreign bills are subject to certain rules which do not apply to inland bills, and as they are usually for an amount beyond the jurisdiction of a justice's court, the subject of inland bills only is here examined.

§ 347. If the bill is payable at sight, or on demand, and on presentation to the drawee he accepts it, he is thenceforth styled the *acceptor*; this acceptance, according to commercial law, where it is not modified by special enactments, may be by parol.³ The statutes in various states have modified this rule, that in New York requiring the acceptance to be in writing, and either on the bill itself, or, if on another paper, that it be shown to some one who, on the faith thereof, receives the bill for a valuable consideration, or that it otherwise comes to his knowledge.⁴ The holder, however, may require the acceptance to be written on the bill itself, and may consider a refusal to comply as a refusal to accept.⁵ The certification of a bill as good by the drawee, or the proper officer if drawn on a bank, is equivalent to an acceptance.⁶ If the bill is negotiable, the payee upon endorsing it is called the *endorser*, and the person to whom he then transfers it, the *endorsee*; and such *endorsee* may again endorse it and transfer it to still another person, when he becomes an *endorser*, and his transferee the *endorsee*, and so as often as it is subsequently endorsed. The *bill* when accepted, is called an *acceptance* of the acceptor.

§ 348. Any written order or request by one person to another to pay a specified sum of money absolutely to any person, is a bill of exchange; and this whether the drawee have funds of the drawer in his hands or not.⁷ It may be payable "in currency," for that is money within the rule. But an order not payable in money, or

¹ 16 Ill. 169. 8 C. B. (N. S.) 581.

² 1 E. D. Smith, 1.

³ Edw. on Bills, 409. 3 Ind. 428. 10 id. 40. 12 Iowa, 32. 1 Wend. 522.

⁴ 1 R. S. 768, §§ 6 and 7. 3 id. (Banks'

5th ed.) 68. 17 Wend. 508. 15 Abbott Pr. 280. See 3 Bosw. 505.

⁵ 1 R. S. 768, § 9. 3 id. (Banks' 5th ed.) 68. 5 Wend. 414. 7 Hill, 577. 12 Cal. 92.

⁶ 25 N. Y. 143.

⁷ 5 Hill, 413. 7 id. 577. 31 Ill. 525.

payable from a particular fund, is not a bill of exchange within the statute requiring a written acceptance.¹

A *check* is a bill of exchange payable to bearer and on demand, and is governed by the same rules.² It is usually in substantially the following form :

Norwich, June 1, 1868.

Mr. JOHN DOE,

Pay James Jackson or bearer fifty dollars.

RICHARD ROE.

If payable to a fictitious person, or to some special designation, as "to the order of bills payable," it is, in effect, payable to bearer.³

An instrument in the following form, "N. will much oblige W. by paying J. R. or order, £20,"⁴ was held a bill of exchange ; and in another case, where the plaintiff held a note against L. and wrote upon it, "L. M. please pay the above note and hold it against me on settlement," and L. M. accepted it, the instrument was held a bill.⁵ Other instances where instruments have been held to be bills of exchange, are cited in note,⁶ while still others where they are held not to be, are cited in note⁷. All of the cases cannot be cited. Those here given or referred to, show the general rule.

§ 349. After the acceptance of a bill of exchange, it is very nearly allied in character with a promissory note.⁸ It thereby becomes the acceptor's promise to pay the money ordered by it to the payee ; and although the drawer's name be forged, it will be binding in favor of an innocent payee or endorsee ; for the acceptor is presumed to know the handwriting of the drawer, and if he mistake it it is his own fault.⁹

§ 350. If an acceptance is written upon the bill, it may be done in compliance with the statute by the drawee simply writing his name across it. At common law, any words written upon it by the drawee indicating that it had been presented, and not denying the request, as "accepted"—"presented"—"seen," &c. were *prima facie* a valid acceptance.¹⁰

¹ 1 Hill, 583. 31 Ill. 525.

² 2 Sand. 328. 12 Cal. 92. 17 Ind. 609.

³ 2 John. Cases, 5. 6 Cowen, 484. 21 Wend. 372. 25 id. 673. 6 Hill, 174. 2 Seld. 417. 4 id. 190.

1 Wend. 522.

¹ 1 Cowen, 691. 15 Barb. 274. 14 id. 186. 1 Hill, 583. 19 Cal. 486. 31 Ill.

³ 3 Term R. 183, 281. 1 H. Black. 569.

525.

2 Duer, 121.

³ 33 Barb. 458. 22 Ill. 330.

¹ 1 Esp. R. 129.

¹ 1 Binn. 27. 1 Hill, 287. 1 Coms. 113. Ch. on Bills, 431. Edw. on id. 544.

¹ 1 Wend. 522.

¹⁰ 2 Hill, 582.

§ 351. An unconditional promise *in writing* to accept a bill before it is drawn, is in New York, by statute, deemed an actual acceptance in favor of every person who, upon the faith thereof, shall have received the bill for a valuable consideration; and a drawee to whom a bill is delivered for acceptance who destroys it, or refuses within twenty-four hours after such delivery, or such other period as the holder may allow to return it, accepted or non-accepted, is deemed to have accepted it.¹ The promise, in writing, to accept must be so definite as to identify and distinguish it from other bills.² A similar rule as to promises to accept prevails in other states.³ An authority to draw on one, even when made by a telegram, is an unconditional promise to accept, within the statute.⁴ It is held in California that a promise to pay a draft to be drawn (which promise must be in writing), is in effect a promise to accept it when drawn.⁵

§ 352. If the drawee refuses to accept the bill in writing, but promise orally to pay it, the promise amounts to nothing, and will not sustain an action, although he had the drawer's funds, and ought in justice to have paid the bill.⁶ His acceptance, however, may be made by his agent, and the agent may, when he determines to accept, direct a clerk to write the acceptance for him and thus bind the principal.⁷ Where a bill is accepted, but the acceptance is not dated, the time of its acceptance may be shown by parol evidence.

§ 353. A *promissory* note is a written promise to pay money. It, and also a bill may be written with a pencil as well as ink, and on paper, parchment, cloth or other similar substance.⁸ Its form is usually substantially as follows:

Norwich, June 1, 1868.

§50. I PROMISE TO PAY JAMES JACKSON ("*or order*," or, "*or bearer*" if it is to be made negotiable,) FIFTY DOLLARS, (omitting the time of payment, if payable immediately, and if payable at a future day, inserting the day, as "*on the first of September next*," or, "*thirty days after date*,") FOR VALUE RECEIVED.

RICHARD ROE.

The signature may be by initials instead of the full name, or the maker (and acceptor, endorser, &c. in the case of bills) may use

¹ 1 R. S. 768, 769, §§ 8, 11. 3 id. (Banks' 5th ed.) 68. 5 Wend. 414. 17 id. 508. 15 Abbott, 280.

² 3 Denio, 553. 5 Hill, 432. 40 Barb. 368.

³ 4 Mich. 450. In Illinois the promise may be verbal. 34 Ill. 313. 35 id. 424.

⁴ 5 Hill, 432. 39 N. Y. 216.

⁵ 29 Cal. 597.

⁶ 5 Hill, 413. 7 id. 577. 1 Sand. 14. 5 Seld. 435. See 3 Bosw. 505; also last section.

⁷ 1 Hill, 501.

⁸ 5 Barn. & C. 234. 14 John. 484. 24 Wend. 531. Edw. on Bills, 149. Story on Prom. Notes, § 11. 6 Hill, 443.

figures or a mark, or any designation or name, in lieu of his proper name,¹ or it may be signed by another person for him by his authority.² If the signature is by a mark, a subscribing witness is not essential.³

It is not necessary that any particular form should be used. Any words which import an absolute engagement to pay are sufficient. As a certificate of deposit, or a common due-bill, in these words: "*Due S. or bearer, \$10;*" "*due A. B. \$325, payable on demand;*" "*due B. \$1, on settlement;*" or a promise *to deliver money*; that the payee *shall receive money*; or *to be accountable or responsible for money*.⁴ An instrument in these words, "*borrowed of J. S. £50, which I promise never to pay,*" was held a good note, the word *never* being rejected as surplusage.⁵ An absolute guaranty on a note payable to S. or bearer, "*of the payment and collection*" of the note, is a promissory note.⁶ So is an instrument in these words: "*Six months from date I guaranty to pay A. or his order, \$180, without interest.*"⁷ Other instances where instruments have been held to be promissory notes or negotiable paper, are cited in note.⁸ Still others where they are held not to be are cited in note.⁹ But, these are far from exhausting the cases on this subject. They are sufficient to illustrate what are or are not promissory notes. Where, after a non-negotiable note was signed by two persons, a third person wrote his name across the back, and it was thereupon transferred to the payee, who paid full value for it, the note having in fact been made to obtain such consideration, it was held that the third person was liable as joint maker.¹⁰

§ 354. It is not necessary that a promissory note should be dated, although it is safe to write it with one.¹¹ If it be not dated, all computations of time in relation to it will be made from the day it was

¹ 6 Wend. 443. 1 Denio, 471. 6 Hill, id. 146. 15 Barb. 274. 24 id. 68. 5 Duer, 443. 11 Wis. 124.

² 21 Ill. 588.

³ 28 Ind. 19.

⁴ 5 John. 237. 2 Cowen, 536. 10 Wend. 675. 1 Hill, 256. 29 Barb. 180. 4 Cal. 37. 29 id. 505. 35 id. 118. See 17 Wis. 222. 18 id. 481.

⁵ Chitty on Bills, 149 to 151. Story on Prom. Notes, § 12.

⁶ 24 Wend. 453. See 4 Sand. 81.

⁷ 3 Barb. 374.

⁸ 15 N. Y. 337. 22 id. 114. 25 id. 496. 29

id. 146. 15 Barb. 274. 24 id. 68. 5 Duer, 207. 14 John. 238. 1 id. 243. 2 Hilton, 526. 19 Ill. 390. 29 id. 101, 114. 31 id. 306. 32 id. 260. 6 Mich. 326. 9 id. 241. 1 Iowa, 488. 10 Wis. 34. 2 Hill, 395. 3 Coms. 19. 2 Hilton, 526. 21 Ind. 433. 22 id. 88. 1 Kansas, 28.

⁹ 16 Barb. 643. 15 id. 274. 4 Denio, 159. 5 id. 444. 7 Ind. 263. 8 id. 108.

¹⁰ 39 Barb. 42. 15 Ohio N. S. 15. 9 Texas, 615. 20 Mo. 571.

¹¹ Story on Prom. Notes, § 45. Edw. on Bills, 150.

issued, as if payable two months from date, the court will intend two months from the day it was made.¹

§ 355. In promissory notes, the signer is called the *maker*, the person to whom it is made payable the *payee*, and when he endorses it he becomes the *endorser*, and the person to whom it is endorsed the *endorsee*, who, by endorsing it, may become an *endorser*, as in the case of bills. The relative rights and obligations of the parties to promissory notes and bills after acceptance, are very nearly similar, the acceptor and maker standing in the same relation to the payee and endorsers; the drawer, in the case of an acceptance, standing in the place of an endorser prior to the payee.

§ 356. An essential quality of both promissory notes and bills of exchange at common law is, that they be payable in money, and not upon any contingency, or from any particular fund.² If they are payable in goods, or anything but money,³ or "provided the terms mentioned in certain letters be complied with," or upon any other contingency,⁴ or from any particular fund, as "from money in J. B.'s hands," or "from the freight of the Veale galley E. C." they are mere contracts, binding on the maker, but not negotiable as promissory notes or bills.⁵ They must also be for a sum certain.⁶ The decisions conflict whether making them payable with current rate of exchange is or not a violation of this rule.⁷ In some of the states, however, notes may be payable in whole or in part, in chattels, especially if payable to bearer.⁸

If, in addition to the promise to pay money, the instrument contains stipulations to do other things, it is not a note.⁹ If payable in money, except at the holder's option,¹⁰ or when the maker is "able," he then being of sufficient pecuniary resources to pay it, it is a note.¹¹ It has been held, however, that a note or bill may be payable in

¹ 4 Barn. Cress. 908. 6 Maule & Selw. 73. 2 Chit. 300.

² 1 Daly, 517. 6 Cowen, 108. 5 Duer, 207. 22 N. Y. 114. 27 Barb. 181. 10 Cal. 372. 6 Mich. 326. 4 Denio, 159. 17 Wis. 139.

³ 6 Cowen, 108. Edw. on Bills, 134, &c. Story on Prom. Notes, § 17.

⁴ 15 N. Y. 425. 25 Barb. 179. 1 Hilton, 310. 2 id. 526. 6 Wis. 209. 15 Mass. 387. Edw. on Bills, 134, 139, 141. Story on Prom. Notes, §§ 22, 27, 33, &c. 5 Denio, 444. 19 Ind. 19.

⁵ 16 Ark. 594. 10 Cal. 372. 2 Str. 1211.

1 id. 591. 6 Mod. 265. Edw. on Bills, 142. Story on Pr. Notes, § 25.

⁶ 10 Wis. 34. Edw. on Bills, 139, 140. Story on Prom. Notes, § 20, &c. See 7 Iowa, 521.

⁷ 24 Ill. 168. 29 id. 101. Id. 114. 10 Wis. 34. 9 Mich. 241. 15 id. 236.

⁸ 15 Ind. 297. 3 Greene, 334. 9 Iowa, 471. 11 id. 85. 27 Ill. 338. 28 id. 397.

⁹ 6 Cowen, 108. 16 Barb. 643. Edw. on Bills, 138. See 7 Iowa, 145.

¹⁰ 22 N. Y. 114. 36 Barb. 307. See 1 Cowen, 692.

¹¹ 6 Ind. 406. See 11 Texas, 572.

"York state bills or specie," or in "bank notes current in New York," they being regarded as money.¹ But not in "bills current in Pennsylvania," or in "Canada money," or other foreign bills.² And an order drawn by A requesting C to credit B or bearer \$30, and he would pay it, is neither a note or bill, as it does not request C to pay money, but only to give credit.³ One case holds that an instrument by which the maker promises to pay when he can make it convenient, with interest till paid, is in effect a promise to pay in a reasonable time, which makes it a good promissory note.⁴

§ 357. Where, however, a direction is contained in a bill for the drawee to reimburse himself from a particular fund, without making the payment depend upon the fund, the bill is valid and negotiable;⁵ as where it was drawn upon the treasurer of Brooklyn, directing him to "pay A. L. or order, \$1,500 for award No. 7, and charge to Bedford road assessment;"⁶ or requesting the drawee to pay to the order of A. a certain sum, "as my quarterly half-pay to be due from the 24th June, to the 24th September next, by advance;"⁷ or where a city warrant was made payable "out of any funds belonging to the city, not before specially appropriated," and "chargeable to general city fund."⁸ Here the sum is payable upon no contingency. So where it is "payable out of and from my separate property."⁹ If, however, the warrant is payable only from a certain fund, it is not a bill or note.¹⁰ It is also held in New York, that if the instrument is on its face valid as a note or bill, there may be an endorsement upon it specifying a condition upon or a fund from which it is to be paid, which endorsement will form no part of the instrument, but merely operate as a notice to any one to whom it is negotiated.¹¹ It is held otherwise in England.¹²

§ 358. The time of payment may depend upon the happening of a contingency, as upon the death of a particular person, or any like event, which will necessarily take place at a future day, or "at such

¹ 9 John. 120. 19 id. 144. 11 Mich. 501. 9 Ind. 135.

² 5 Cowen, 186. 23 Wend. 71. Edw. on Bills, 134, &c. Story on Pr. Notes, §§ 17, 18 and 19. 1 Kansas, 28.

³ 3 Halst. 262.

⁴ 10 Ohio N. S. 88.

⁵ Edw. on Bills, 143. Story on Pr. Notes, § 26.

⁶ 4 Hill, 263.

⁷ 2 Strange, 762.

⁸ 23 N. Y. 570.

⁹ 48 Barb. 428.

¹⁰ 1 McAll. C. C. Cal. 175.

¹¹ 8 John. 485. 15 Wend. 363. See 14 How. Pr. R. 489.

¹² Edw. on Bills, 145. Story on Pr. Notes, § 23. 4 Camp. 127. 4 Maule & Selw. 25. 2 Camp. 205.

time and place as the payee should require.”¹ It may also be limited in the alternative, as to pay on the first of May next, or when a certain house should be completed.² But this decision is questioned by Mr. Rand in his second edition of the Massachusetts reports, and is overruled in New York.³ A similar English decision, that an instrument payable two months after, or when a ship is paid off, is a promissory note, is also questioned.⁴ If no time of payment is mentioned, it is due immediately.⁵ And this though it contains a provision for the payment of interest after a certain event.⁶ An instrument which provides that the payment is not to be expected until certain property of the maker is “sold for a fair price,” is not a note.⁷

§ 359. Promissory notes and bills should specify by whom and to whom they are payable. If payable “by A. or B.” or “to A. or B.” they are not valid as notes or bills, although if they are expressed to be “for value received,” they are good as contracts, and will warrant a recovery in an action for money had and received.⁸ Where there are two persons having the name of either of the parties to the note or bill, it is well to distinguish which is meant, by his place of residence, or some addition, as “*senior*,” “*junior*,” “*second*,” &c. Where there is a father and son of the same name, a note or bill payable to the name, is *prima facie* payable to the father.⁹ But if the son held the instrument he might recover upon it in his own name.¹⁰ Indeed, the presumption is always that the holder of negotiable paper is the owner thereof.¹¹ *Aliter* as to that which is non-negotiable.¹² If the paper is payable to persons, officers of an incorporated company, or to their successor’s in office, it is a promissory note, and may be prosecuted by those persons, though others have succeeded them.¹³ So a promise in writing “to pay steamboat Juda and owners, or order,” is a promissory note.¹⁴

¹ Edw. on Bills, 141. Story on Pr. Notes, § 27. Chitty on Bills, 156. 9 John. 217. 14 id. 223. Willes, 396. 2 Str. 1217. 1 Burr. 226. 25 Barb. 179. 15 N. 425.

² 7 Mass. 240.

³ 25 Barb. 102.

⁴ Edw. on Bills, 142. Story on Pr. Notes, § 27.

⁵ 8 John. 189. Id. 374. 15 Wend. 308.

⁶ Denio, 12. 29 Barb. 180. 11 Ohio N. S. 601.

⁷ 17 Cal. 623. 11 Ohio N. S. 601.

⁸ 32 Wis. 415.

⁹ 4 Barn. & Ald. 679. 2 id. 417. 4 Wend. 575. Story on Pr. Notes, §§ 83, 34, 35. Edw. on Bills, 125, 131, 132, 134 16 Ill. 169. 19 id. 81.

¹⁰ Chitty on Bills, 178. Edw. on id. 125.

¹¹ 1 Stark, 106 (85).

¹² 7 Ind. 556. 4 id. 522. 3 Greene, Iowa, 108. 3 John. Cases, 5. Id. 259.

¹³ 1 Minn. 96.

¹⁴ 6 Taunt. 325. 2 Seld. 124.

¹⁵ 8 Ind. 18.

§ 360. They may be drawn payable to bearer generally without the mention of any person as payee, in which case they can be negotiated by simple delivery.¹ They may also be drawn payable to the order of a fictitious person, or to the order of the maker, in which cases, when negotiated by the maker, they have the same effect as if made payable to bearer.² The statutes in some of the states have practically adopted this rule.³ Notes not payable to bearer must be endorsed by the payee, or sued in his name, or that of his legal representative (except in those states where a different rule is established).⁴ If the name of the payee be left blank, the holder may insert his own as payee,⁵ but if the promise is not to pay any one, but simply "I promise to pay \$500 on demand, value received," it is mere waste paper.⁶ If drawn in the singular number, as if a note be drawn, "I promise to pay," and signed by two or more persons, it is regarded as made by them jointly and severally, and the holder may bring his action against all or any one of them.⁷ If payable to one by a wrong name, he may bring his action in his right name and show the mistake.⁸ If several persons sign a paper by which they jointly and severally agree to pay to a person named or bearer, the sums set opposite their names, expressing upon what consideration, this is a promissory note, each being jointly and severally liable for the whole amount subscribed, the only effect of the subdivision of the amounts being to regulate the rights of the parties as between themselves.⁹

§ 361. When drawn payable to the order of a particular person, they can in the first instance be negotiated only by his endorsement. This may be in *blank*, *in full*, *restrictive* or *qualified*. It is in blank when the payee simply writes his name upon the back of the bill or note. It is then transferable by delivery, and any person in whose possession it is, is presumed to be its owner. It is *in full*, or *special*, when the endorser directs by his endorsement the payment to be made to the order of a certain person. Here the endorsee alone

¹ Story on Prom. Notes, § 36.

² 3 Hill, 112. 1 Transcript, 201. 29 Ill. 321. Chitty on Bills, 179. Edw. on Bills, 125. Story on Pr. Notes, § 39. 11 Ind. 121. 22 Iowa, 399. See 4 Nevada, 133, and refs.

³ 1 R. S. 768, § 5. 3 id. (Banks' 5th ed.) p. 68. 2 Sand. 138. 1 Bosw. 202. 4 E. D. Smith, 83. 24 Ill. 190.

⁴ 4 Greene, Iowa, 157. Id. 187.

⁵ 2 Maule & Selw. 90. 5 Taunt. 529.

8 Ind. 18. 10 Serg. & Rawle, 170. Story on Pr. Notes, § 37. Edw. on Bills, 132. See 5 Bosw. 178, 319. 16 Ill. 169.

⁶ 1 H. Bl. 605. 6 Wend. 637. Edw. on Bills, 131.

⁷ Story on Pr. Notes, § 57. Edw. on Bills, 681, 682. 7 Mass. 58. N. Y. Code, § 120. 19 Ill. 347. 30 Ind. 317.

⁸ 2 Stark. 27. Chitty on Bills, 178, 580, 615.

⁹ 49 Barb. 102.

receives the bill or note, by virtue of the endorsement, and he may then further negotiate it by either form of endorsement. It is *restrictive* when the endorsement prevents its further negotiability, by restraining the payment to a particular person; as by writing before the endorser's signature, "Pay to A. for my use," or "Pay the contents to A. only," or any other expression which clearly indicates that the endorser intends to prevent its further transfer.¹ A qualified endorsement is where the endorser endorses in such a manner as to avoid rendering himself responsible in case the bill or note is dishonored. This is usually done by writing the words "Without recourse to me" either before or after the endorser's signature. It may be by any equivalent expression. It is the proper mode for agents who have received bills or notes payable to their order to transfer them to their principals. Also for treasurers, cashiers, &c.²

§ 362. An endorser may make a *conditional* transfer by writing the condition before his endorsement. If, therefore, the payee of a bill, before its acceptance, make a conditional endorsement, the drawee who accepts it so endorsed will be bound by the condition, and if its terms are not complied with, the property of the bill will revert to the endorser, and he may recover the sum payable of the acceptor.³ The rule applies to promissory notes.⁴

§ 363. It is not essential to notes or bills that they should be payable to order of the payee or to bearer. If, however, they are not, they are not *negotiable*.⁵ But if made payable to the order of the person who should thereafter endorse them, or if they contain any words indicating that the maker intended that they should be negotiable, they are;⁶ and if originally intended to be negotiable, and the words of transfer are omitted by mistake, they may be inserted.⁷ But this rule applies only to special cases where it is intended that the omission shall be supplied, and not where the note was perfect when it was delivered.⁸ If the payee is described as the agent of a manufacturing company, he may, notwithstanding, bring an action in his own name.⁹ If one without authority from his principal sign

¹ Chitty on Bills, 258. Edw. on Bills, 253, 277, &c. Story on Pr. Notes, §§ 138, &c.

² Edw. on Bills, 282, 3. Chitty on id. 254, 260, &c. Story on Pr. Notes, §§ 146, &c. 3 Mass. 225. 7 id. 470. 7 Cranch, 159.

³ Chitty on Bills, 261. Story on Pr. Notes, § 149.

⁴ 2 Stark. (232) 206. Story, *supra*.

⁵ Chitty on Bills, 261. Edw. on id. 131. 3 Caines, 137. Story on Pr. Notes, § 3.

⁶ 2 Hill, 59.

⁷ Chit. Bills, 181. 17 Wend. 243.

⁸ 3 Barb. 374.

⁹ 8 Mass. 103. Dunlap's Paley, 361, n. a.

32 Ill. 260.

a bill or note as agent, or sign it in the name of another, he may be regarded as the drawer or maker.¹ The drawee of a bill or the endorser of a note or bill may, however, make a qualified acceptance or endorsement by words indicating that he does not accept or endorse the paper in his individual capacity, but as an agent or treasurer of a corporation; as where a bill was drawn by the agent of a corporation upon E. H. who was its treasurer, but without giving him his official designation, and E. H. accepted it, annexing to his signature the words, "treasurer, &c."²

§ 364. Neither is it necessary that a note or bill should contain the words "for value received," or any expression tantamount to them, nor are they material in an endorsement. And indeed, if the complaint alleges that the note or bill, or an endorsement was made "for value received" it need not be proved.³ Where such words are used in the complaint they imply a consideration, and unless the want thereof is expressly put in issue, the note proves the fact.⁴

§ 365. Bills and notes take effect from the time of their delivery, and are considered as made or drawn at that time without regard to their date, though the presumption is that they are delivered on the day of their date.⁵ They may be made payable at any time agreed upon by the parties, as any number of days, months, or years, after date, or after sight, or upon any particular day, or upon demand, and with or without interest from the date. If the time of payment is not expressed, they are payable on demand, and in this case they draw interest from date, although there be no mention of interest contained in them.⁶ The time of payment cannot be altered by parol evidence; and a separate written agreement varying it, is not a part of the contract but a distinct one, and the subject of a cross action if violated.⁷ This rule, however, does not forbid a subsequent agreement, upon a legal consideration, to give time, which will be valid as against the maker or a purchaser after maturity, or with notice.⁸

§ 366. As a general rule, the alteration of a bill or note in a *material* part, by a party, or with his knowledge, unless done with the consent of *all* the other parties concerned, renders it void, even

¹ 3 John. Cases, 70. 13 John. 307. 1 Denio, 471. 28 Barb. 644. 26 N. Y. 117. 20 Mo. 284.

² 13 Barb. 636. 5 Seld. 582.

³ Chit. Bills, 79, 583. Edw. on id. 169, 170. Story on Pr. Notes, §§ 51, &c. 2 E. D. Smith, 395. See 7 Ind. 263.

⁴ 29 Ill. 104. 25 Ind. 246.

⁵ 2 John. 300. Chitty on Bills, 169. Edw. on id. 150, 1, 187.

⁶ Chit. on Bills, 170. 8 John. 189. 15 Wend. 308. Edw. on Bills, 512.

⁷ 8 John. 189. 4 Mass. 414. 30 Mo. 243.

⁸ 10 Ohio N. S. 497. 27 Ill. 323. 25 Barb. 175. See 1 Coms. 274. Edw. on Bills, 355.

in the hands of an innocent holder. Alterations are material among other instances when they affect the date, time of payment, place of payment, sum to be paid, manner of payment (as by inserting after the name of the payee "or order") or consideration.¹ Thus, where A. & B. made their note, and it was altered by B. before it was negotiated, it could not be collected of A.² It makes no difference with the rule, that the alteration is for the benefit, really or apparently, of the maker.³ It is held in England, that the addition of the signature of another maker, *after* the execution and delivery of a note, avoids it, if done without the knowledge and consent of the prior makers;⁴ and the same rule prevails in Indiana and Iowa.⁵ It is held in New York that such an addition is not such an alteration as avoids the note.⁶ If the name of the payee or maker is erased, or new ones substituted,⁷ or if a joint note is made a joint and several one, or *vice versa*;⁸ or if seals are affixed to the signatures after execution;⁹ these and similar alterations, without the assent of the parties affected, will avoid the note. If duplicates are given, the alteration of one does not affect the validity of the other.¹⁰ It is otherwise, however, if the alteration be immaterial¹¹ or the correction of a mistake,¹² or the insertion of senseless or inoperative words;¹³ or which are mere surplusage, not changing the legal effect;¹⁴ or a memorandum;¹⁵ or the insertion of words which the law would supply,¹⁶ as where the date was intended to run "in the *year* of our Lord," and the word *year* was omitted and supplied.¹⁷ If the holder of a note makes an arrangement with the principal by which the signature of one of the sureties is erased, it is still valid against the principal, but not against co-sureties.¹⁸ An obliteration with a lead pencil is not necessarily an alteration;¹⁹ nor are the writing over of pencil

¹ 4 Barn. & Ald. 197. Ry. & Mood. 362.
 19 John. 391. 17 Wend. 238. 24 id. 374.
 3 Barb. 374. 22 id. 647. 31 id. 403. 40
 id. 16. 41 id. 465. 1 Daly, 280. 5 Wis.
 534. 17 id. 232. 21 Ill. 129. 34 id. 100.
 9 Ohio N. S. 443. 16 id. 348. 11 Cal. 88.
 19 Ind. 329. 25 id. 246. 30 id. 210. See
 42 Mo. 451. Also 2 Barb. Ch. 120, &c. in
 a valuable note on this whole question.

² 4 N. H. 455.

³ 15 East, 412. 19 Penn. 119. 32 id.
 423. 13 N. H. 385.

⁴ 5 Ellis & B. 82.

⁵ 20 Ind. 139. 17 id. 161. 19 Iowa, 521.

⁶ 27 N. Y. 39. 29 id. 400. 29 How. Pr.
 R. 193; but see 46 Barb. 379.

⁷ 11 Mees. & Wels. 590. 2 Pa. St. 54.
 1 Gil. 475. 1 Halst. 215. 21 Iowa, 244.

⁸ Holt, 474. 2 Car. & P. 401.

⁹ 13 Mees. & Wels. 343.

¹⁰ 4 Wend. 423, 6.

¹¹ 22 Wend. 391. 16 Ill. 445. 5 Cal. 173

¹² 17 Wend. 238.

¹³ 15 Wend. 302. 15 Pick. 239.

¹⁴ 1 Denio, 239.

¹⁵ 12 Pick. 399. 8 Com. Bench, 433.

¹⁶ 7 How. Miss. 176. 5 Taunt. 710. 10
 Wend. 93.

¹⁷ 6 Mass. 519.

¹⁸ 1 Denio, 120. 3 Ohio N. S. 445. 21
 Iowa, 244. 21 Ill. 129. *Infra*, note (2).

¹⁹ 12 Barb. 595, 601.

writings with ink, or the change of the figures in the margin of a note representing the amount for which it is given.¹ If the holders and makers make an alteration, the note is good as to them, but discharged as to a surety; his subsequent assent will however hold him, even if without new consideration.² Unauthorized endorsements of credits may be erased by the holder;³ if a note is expressed to be "for value received," it does not vitiate it to insert the origin of that value.⁴ So it is proper to insert words of negotiability where they have been omitted by mistake.⁵ Though this is denied in one case, which holds that any such alterations, even by filling up blanks which left the note imperfect, are allowed only in special cases.⁶ It has been held that a bill, the date of which was altered after acceptance and before negotiation, without the acceptor's consent, was valid in an endorsee's hands. If, however, the acceptance had been for the accommodation of the drawer, it would have been otherwise.⁷ If the date or amount are left blank, the holder may fill up the blanks with proper dates or amounts without invalidating the note.⁸

§ 367. It was formerly held that the general rule laid down in the last section did not apply where one transfers, by his simple endorsement, a note not negotiable, and the holder writes a guaranty of the payment over his signature to the endorsement; for by his endorsement of a non-negotiable note, he may be regarded as the maker of a new note for the amount, or the guarantor of the note endorsed, and is not entitled to notice in order to charge him as an endorser.⁹ Subsequent cases in New York, however, hold that on making such an endorsement the party is not a guarantor or maker, but an endorser, and that this relation cannot be changed by writing a guaranty or new note over his endorsement.¹⁰

§ 368. The rule was early established in New York, that if an alteration be apparent on the face of the note or bill, it is presumed to be made before execution until the contrary be shown. It is, however, a question for a jury; and where there are strong circumstances to induce a suspicion that the alteration has been made fraudulently, general corroborating circumstances may be admitted to strengthen the suspicion, as that other notes made by the same parties to take

¹ 14 Texas, 329. 1 R. I. 398.

² 13 Iowa, 567. 21 Ill. 129.

³ 13 Ind. 542. 28 Ill. 188.

⁴ 21 Ill. 129.

⁵ 17 Wend. 243. 3 Esp. 246. 2 Man. & Gr. 890.

⁶ 3 Barb. 374. See 20 Ind. 317.

⁷ 2 Chit. 122. 5 Barn. & Ald. 674.

⁸ 21 N. Y. 531. 3 Keyes, 117.

⁹ 8 Wend. 421. 13 John. 159. 17 id. 326.

¹⁰ 7 Hill, 416. 1 Coms. 326. 4 Duer, 45. 19 N. Y. 227.

up one of which the note in question was made had been altered; and either party may show circumstances attending the alteration.¹ But subsequent cases there and elsewhere, leave the rule whether an alteration is presumed to have been made before or after execution in doubt. Some cases in New York hold that where it *is suspicious*, and beneficial to the holder, the presumption is against him, and he must explain it before he can recover.² Others go still further, and seem to hold that any alterations must be explained.³ Subsequent cases hold that there is no presumption that the alteration was after the execution of the note, and that the jury cannot, from the mere fact of an alteration appearing, find it was made afterward.⁴ The better rule would seem to be that, whatever is the presumption from the mere fact of an alteration, the instrument itself, "with all the circumstances of its history, its nature, the appearance of the alteration, the possible or probable motives to the alteration, and its effect upon the parties respectively, ought to be submitted to the jury;" in short, that the question is really one for the jury.⁵ That the alteration is in a different ink from the rest of the paper is not enough to call on the holder to make an explanation.⁶ In Indiana and Iowa the rule seems to be well established that it is presumed the alteration was made at or before the execution of the instrument.⁷

[§ 368*a*.] An alteration made by a stranger, or by the opposite party, against the consent of the one claiming under it, or by virtue of it, will not avoid a note or other writing.⁸ Formerly the rule was otherwise.⁹

§ 369. Where a note is made for the accommodation of the payee with a view to its being discounted at a bank, it may be discounted by any other person, on the refusal of the bank to discount it.¹⁰

§ 370. Any person legally capable of making a contract may be a party to a bill or note; ¹¹ as a corporation, that is capable by law of making contracts, provided the note is given in its legitimate busi-

¹ 2 John. Cases, 198, 200.

² 7 Barb. 568, and refs.

³ 2 Wend. 555, 559. 22 id. 388. See 1 Burn. Wis. 185.

⁴ 1 Bosw. 352. 1 E. D. Smith, 10.

⁵ 1 E. D. Smith, 10. 1 Bosw. 352. 1 Halst. 215. 6 Ind. 152. 31 How. Pr. R. 242. 44 N. H. 227. See 1 Gilm. 475. 16 Ill. 445. 20 id. 437.

⁶ 3 Barb. 404. 4 Iowa, 63. 7 id. 148.

⁷ 6 Ind. 152. 4 Greene, Iowa, 212.

⁸ 5 Barb. 501. 6 Cowen, 746. 8 id. 71. 1 Wend. 625. 1 Daly, 280. 2 Barb. Ch. 119. 9 Ad. & E. 934. 6 East, 309. 22 Mo. 596. 4 Ohio N. S. 529. 34 Ill. 100.

⁹ 11 Coke, 27. 2 Barb. Ch. 133.

¹⁰ 17 John. 176.

¹¹ Chit. on Bills, 15. Story on Pr. Notes, § 61.

ness¹ (which must be affirmatively proved),² and, for certain purposes, an infant. Thus an infant may transfer a bill or note by endorsement,³ though he might defend an action brought against him as endorser.⁴ And as his contracts are not void, but only voidable at his election,⁵ he may make or endorse a note, or draw, or accept, or endorse a bill, and if he should, after he became of age, promise to pay it, his promise will bind him on the ground of a prior obligation.⁶ That promise must be to the holder or his agent. If made to a stranger it will not be binding.⁷ In like manner, if he be a partner, his promise after he becomes of age to pay a note drawn or endorsed by the firm is valid.⁸ If a note or bill be made payable to, or transferred by endorsement to an infant, he may collect it by action.⁹

§ 371. A married woman could not at common law be a party to a bill or note,¹⁰ except in the single case of her endorsement for the purpose of transferring one which she owned prior to her marriage, in which case the endorsement should be made with the assent of the husband.¹¹ The statutes of England and of various of the states, have materially changed this rule, enlarging the powers of the wife; so that there is now no general rule applicable to such states, each being governed by its own statutes. In New York, by various separate enactments, married women are allowed to carry on business on their own account, and may make all necessary contracts relative thereto, such as giving a note, &c.¹² Under the code of Iowa of 1851, the wife may make binding contracts in respect to her separate property, without her husband's assent, and if she signs a note with her husband, it is good where it is given for family expenses and necessities, and she agrees on its face that her separate property shall be

¹ 5 Denio, 567. 4 Kern. 363. 6 Seld. 449. 23 Barb. 176. 1 R. S. 768, § 3. 3 id. (Banks' 5th ed.) 68. Chitty on Bills, 17. 1 Cowen, 513. Story on Pr. Notes, § 74. Edw. on Bills, 75, &c. 9 Ind. 359. 13 Wis. 653.

² 5 Denio, 567.

³ Chit. on Bills, 23. Edw. on id. 67. Story on Pr. Notes, § 80. 15 Mass. 272. 14 Ind. 382.

⁴ Chitty on Bills, 22.

⁵ 3 Wend. 479. 17 id. 419. Chit. on Bills, 23.

⁶ Edw. on Bills, 65. Chitty on id. 23. 17 Wend. 419. 18 Barb. 320.

⁷ 2 Hill, 120. 22 Barb. 150.

⁸ 14 Mass. 457.

⁹ Chitty on Bills, 24. Edw. on id. 68. Story on Pr. Notes, § 79.

¹⁰ 18 N. Y. 265. 22 id. 450. 5 Iowa, 426. 3 Cal. 83. 4 id. 285. 5 id. 457. 10 id. 265. 5 Wis. 245. 9 id. 516. Story on Pr. Notes, § 85. Edw. on Bills, 68, &c. Chitty on id. 24.

¹¹ 12 Wend. 433. 4 Seld. Notes, 19. 25 Mo. 364.

¹² Laws of 1848, ch. 200. Id. of 1849, ch. 375. Id. of 1860, ch. 90. Id. of 1862, ch. 172. 3 R. S. (Banks' 5th ed.) 239, 240, §§ 75, &c. 35 Barb. 78. 24 How. Pr. R. 31. 2 Abbott N. S. 220, note.

held therefor.¹ In Wisconsin, under their statutes, married women can make all such contracts as are necessary or convenient for the beneficial enjoyment of their separate property.² For the law of Nevada on the subject, reference is made to her statutes.³ That of Ohio is on page 64 of her laws of 1861, as construed by decisions.⁴ That of Oregon at page 786, chapter 32, of the general laws of that state. In California, there are both statute and decisions;⁵ as is also the case in Illinois.⁶ That of Indiana is found in her laws, 1 G. & H. § 5, p. 295, of the acts of 1853, and laws of 1861, ch. 101; and that of Michigan in vol. 1, compiled laws, p. 73; 2 id. pp. 964 to 967 inclusive. The New York statutes have not enabled a married woman to give an accommodation note, even where it contains a charge of her separate estate to its payment.⁷ And a person taking such a note, even *bona fide* and for value, cannot recover upon it against her.⁸ It will make no difference at common law if the married woman live apart from her husband, either on a separate maintenance, or in a state of adultery, or if she be divorced from his bed and board;⁹ and it has been held that her promise made after his death to pay a note made or endorsed by her while married, will be of no avail unless she had a separate estate at the time she made or endorsed it.¹⁰ But these authorities have been overruled in New York in a case where a married woman, who was a trader, having given her note for goods purchased in her business, promised to pay it after her husband's death. It was held that at common law this enabled the holder to recover on the note.¹¹ Where, however, a married woman endorsed a note, and the maker promised the endorsee to pay it, it was held that an authority from her husband to transfer it might be presumed, in an action against the maker. And where an endorsement by a married woman is not valid as against her, yet as between the holder and any party to the note after her endorsement, its invalidity cannot be set up.¹²

¹ 9 Iowa, 163. 13 id. 596. See also, 17 March 24, 1869. 32 Ill. 493. 37 id. 247. 40 id. 399. 46 id. 370.

² Rev. Stat. of Wis. 1858, ch. 95. 13 Wis. 125. 15 id. 365. 16 id. 480. Also, 5 id. 245.

³ Laws of Nevada, 1865, ch. 76. Id. of 1867, ch. 10.

⁴ 14 Ohio N. S. 448. 16 id. 509.

⁵ Laws of California, 1852, ch. 42. 6 Cal. 498. 7 id. 458. 10 id. 12. 22 id. 52. 26 id. 435. 29 id. 120. 31 id. 476.

⁶ Laws of Illinois, 1861, p. 143. Id. of

⁷ 52 Barb. 125.

⁸ 18 Abb. Pr. 223. 28 How. Pr. R. 155.

⁹ Chit. on Bills, 24. Story on Pr. Notes, § 85. But see 4 Iowa, 321; 5 Ohio N. S. 580, under their statutes.

¹⁰ Chit. on Bills, 25. 1 Str. 94. 5 Taunt.

36. 11 Adolph. & E. 238.

¹¹ 26 N. Y. 604.

¹² Chitty on Bills, 27. Story on Pr. Notes, § 87.

§ 372. Where a husband allows his wife to act as his agent, her endorsement in his name will bind him, whether to transfer a note or bill, or to render him liable upon his obligation as endorser.¹ So if the husband is present at the execution of a mortgage by his wife of his personal property and assents to its execution.² Where a wife who was in the habit of making purchases for her husband, bought certain property which was afterward used on her husband's farm, giving her own note therefor, it was held in an action *for the property*, that it was a question for the jury whether she did not make the purchase as her husband's agent, although she told the seller when she bought the property, that it was bought for herself and was hers.³ Chitty says: "If the husband is a tradesman and unable to write, and it appears that his wife has usually written for him whatever was requisite in his business, in order to bind him upon a note or bill signed by her, it must appear that it was signed in the course of his business; and this notwithstanding he has recognized her signature to it."⁴ But the above cases somewhat enlarge this rule.

§ 373. At common law, a note payable or endorsed to a married woman, belonged to and in legal operation was payable to her husband; and might be negotiated or collected by him, either in his own name alone or in the name of himself and his wife jointly;⁵ and in such case where he sued alone upon it, a debt due from his wife before marriage could not be set off.⁶ In like manner, where a note was made or endorsed to her before marriage, on her marriage it became vested in her husband; while it was somewhat doubtful, whether, if it fell due before marriage, the action should not be by both husband and wife, it was not necessary for him to join her name with his in the action if it fell due afterward.⁷

[§ 373a.] The statutes of various states have modified or entirely changed this rule. In New York, marriage now does not vest the property of the wife in her husband, nor prevent her receiving to her own use from any other person than her husband any real or personal estate; and the Code of Procedure enables her to bring her action in her own name in respect to it.⁸ References are made to

¹ Edw. on Bills, 71, &c. Story on Pr. Notes, § 87.

² 5 Seld. 40.

³ 5 Seld. 205. 27 Barb. 480. See 29 id. 193.

⁴ Chitty on Bills, 25.

⁵ Story on Pr. Notes, §§ 88, 124. Edw. on Bills, 71, &c. Chitty on id. 26.

⁶ 10 Barn. & Cress. 558.

⁷ 1 Barn. & Ald. 218. Chitty on Bills, 26.

⁸ Laws 1848, ch. 200. 1849, ch. 375. 3 R. S. (Banks' 5th ed.) 239, 240, §§ 75, &c. Code of Procedure, § 114.

the rules in other states upon the general question of the rights between husband and wife, *ante* § 371, so far as we have been able to consult the proper authorities.

§ 374. Where a bill or note is payable to the order of a particular person, it cannot be transferred without his endorsement, so as to render it available as commercial paper, although it may be transferred in any manner as another contract may be. If it is transferred by endorsement before it is payable, the transferee who has received it in good faith and for a valuable consideration, can collect it of the acceptor or maker irrespective of any legal or equitable set-off or defense which existed between the original parties, with the exception of such defenses as exist by virtue of the statute declaring notes made for certain purposes absolutely void.¹ If transferred without endorsement, the transferee may bring his action upon it, but the defendant may in this case set off any payment or demand which he had against the payee previous to receiving notice of the transfer, or may interpose any defense which might have existed against the demand while in the payee's hands;² and the same rule holds in the case of a note payable to a certain payee, without being made payable to his order or to bearer, and which is therefore not negotiable.³

§ 375. A bill made payable to the order of a fictitious payee or order, is transferable by delivery.⁴ And by statute in New York, notes made payable to the order of the maker or of a fictitious person, if negotiated by the maker, have the same effect and are of the same validity as against the maker and all persons having knowledge of the facts, as if payable to bearer.⁵ The same general rule applies to bank checks payable "to the order of bills payable" or other fictitious payee, and to notes payable to the order of the maker.⁶

§ 376. If the payee of a note not negotiable, transfer it by endorsement, he becomes liable as endorser upon it, in the same manner as if it were payable to his order.⁷

§ 377. Either of the parties to a bill or note may act by a duly authorized agent, and the payee may make the drawer of a bill or the maker of a note, his agent to endorse and negotiate it.⁸ In the case

¹ 1 Wis. 436. Edw. on Bills, 258, &c.

² 13 Mass. 305. 3 Wend. 69.

³ 20 John. 144. 2 R. S. 354, § 18. 3 id. (Banks' 5th ed.) 634, § 12. See 40 Ohio N. S. 586. 16 Wis. 616.

⁴ Chitty on Bills, 178.

⁵ 1 R. S. 768, § 5. 3 id. (Banks' 5th ed.) 68. Supra, § 360.

⁶ 2 Duer, 121. 3 Hill, 112.

⁷ 3 Coms. 494.

⁸ 1 R. S. 768, § 2. 3 id. (Banks' 5th ed.) 68. 2 Barn. & C. 294. Edw. on Bills, 80, &c. Ch. on id. 81. Story on Pr. Notes, § 65, &c. 1 Hall, Sup. Ct. R. 336.

of bills or notes held by partnerships, either partner may, in the course of the partnership business, endorse the firm name or authorize an agent to do it. If they are held by joint owners, who are not partners, each must join in the endorsement, and after the dissolution of a partnership, both partners must unite in the endorsement unless one is specially authorized to use the name of the former firm.¹ If one partner dies, and a dissolution is thereby created, the survivor may endorse in his own name.² Where held by a bank, the cashier may endorse for the corporation, *ex officio*, and the president or other officer, by vote of the directors.³ On the death of the payee or holder of a bill or note, it vests in his executors or administrators, who alone can transfer it. If the payee makes an assignment as an insolvent debtor, his assignee alone can do it.⁴

§ 378. A bill or note once negotiable may be transferred by the holder at any time; but if it is transferred after it has become payable, the holder is liable to be met with any defense or set-off which existed at any time after its maturity, against the payee in favor of the acceptor or maker.⁵ If it be transferred by endorsement after it is payable, the endorser may be charged by the endorsee presenting it and demanding payment of the acceptor or maker immediately, or as soon as it can reasonably be done, and upon his failure to pay, notifying the endorser as in other cases;⁶ but with this exception, the transfer after the maturity will not affect the rights of any of the parties to the bill or note further than to pass them from the endorser to the new endorsee.⁷

§ 379. The endorser's name may be written on the back or any other part of the bill or note, and if there is, or is not room for them there, they may be written on an annexed paper, called an *allonge*.⁸ Where written by the endorser's agent, he should either simply write the name of his principal, or write it with the addition, "by A. B. his agent."⁹ The authority of the agent may be express by oral or written authority, or it may be implied from the relations proved to

¹ Story on Pr. Notes, § 125. Edw. on Bills, 99. Chitty on id. 226. Cowen, 387. 3 Barb. Ch. 403. Edw. on Bills, 56, &c. Chitty on id. 242. Story on Pr. Notes, §§ 191, &c.

² Story on Pr. Notes, § 125.

³ 11 Mass. 94. 17 id. 94. 4 Hill, 442. ⁴ 12 Cal. 308. 6 Bosw. 593. 7 Minn. 5 Denio, 283. 74. 3 Wend. 75.

⁵ Story on Pr. Notes, § 120. Edw. on Bills, 247. Chit. on Bills, 226, 227. ⁶ 3 Cowen, 252.

⁷ Chitty on Bills, 262. Edw. on id. 267. ⁸ Infra, §§ 888, &c. 4 Cal. 309. 25 Ill. Story on Pr. Notes, § 151. 15 Ind. 59.

507. 29 id. 149. 12 Wis. 373. 10 Iowa, 29 Ill. 92. 16 Wis. 616.

208. 12 id. 63. Id. 99. 13 id. 562. 1 ⁹ Chit. on Bills, 254.

exist between him and the principal, or the recognition of his acts, as in other cases of agency.¹ And any signature which would be sufficient to hold the principal in other cases, will be sufficient to an endorsement of a bill of exchange or promissory note.²

§ 380. Where a bill or note is payable to bearer, or where payable to the order of the payee, and by him, or by any subsequent endorser endorsed in blank, the law presumes that the holder is the rightful owner of it; that he received it in the usual course of commercial business, in good faith and for a valid consideration; that it was made upon a good consideration passing to the maker, and that it was transferred to the holder immediately thereafter.³ Neither of these facts need be pleaded nor proved, unless they are specially controverted.⁴ If, therefore, partners sue as the holders of a bill or note, its production endorsed in blank is sufficient to show their ownership.⁵ The holder of a note endorsed in blank, may fill it up so as to make it payable to his own order or to the order of any other person,⁶ or may make the endorsement restrictive.⁷ And if the endorsement is so filled up or made restrictive by the holder, not for the purpose of transferring it, but simply for the convenience and safety of its collection, he may afterward strike it out.⁸ A person is liable as endorser to a *bona fide* holder who writes his name on the back of a negotiable bill, though he never delivered it with the intent to transfer the title.⁹

It was once held, in one case, that the presumption in the case of a full endorsement is, that the bill or note has been transferred to the endorsee; and to divest him of this *prima facie* legal title, it must be shown that the endorsement has been canceled by one having authority to do so.¹⁰ But this is against the current of the decisions, and is overruled in New York.¹¹

¹ 1 Hall, 340.

² 11 Mass. 288.

³ 11 A.D. & E. 702. 3 John. Cases, 5.
9 John. 217. 8 Wend. 600. 18 id. 557. 6 Hill, 336. 1 Denio, 116. 7 Paige, 615. 4 Coms. 166. 2 Seld. 209. 33 N. Y. 581. 17 Barb. 530. 18 id. 344. 19 id. 147. 4 Ind. 522. 7 id. 556. 9 id. 278. 5 Cal. 458. 9 id. 246. 16 Ill. 371. 20 id. 557. 28 id. 397. 8 Wis. 267. 3 Greene, Iowa, 108. Id. 572. 4 Iowa, 140. 9 id. 521. 22 id. 234. 6 Md. 819.

⁴ 9 Cal. 246. 5 id. 458. 19 Ill. 161. Edw. on Bills, 78. See 2 Minn. 219.

⁵ Chit. on Bills, 255.

⁶ 3 Cowen, 252. Edw. on Bills, 271, 272. 16 B. Mon. 572. 17 Ill. 459. 25 id. 341. 28 id. 506. 10 Ind. 226. 16 id. 481.

3 Greene, Iowa, 108.

⁷ Chit. on Bills, 257. Edw. on id. 277. Story on Pr. Notes, § 142.

⁸ 2 Hill, 140. 1 Denio, 367. Id. 608. 5 id. 51. 1 Sand. 37. 11 Ind. 293. 16 id. 284. 25 Ill. 341.

⁹ 5 Duer, 260.

¹⁰ 15 Loui. R. 265. Cited, 2 Hill, 142.

¹¹ 3 Wheat. 173. 1 Sand. 37, and refs. Breese, Ill. 288. 2 Scam. 432. See 19 Ill. 572. 16 Ind. 284. Edw. on Bills, 271. 1 Denio, 367.

It is proper to add that these rules do not apply to paper that is not negotiable.¹

§ 381. A bill, or note, or other contract, except on the consent of the debtor, cannot be transferred for a part only of the sum due, for a personal contract cannot be apportioned except by such consent; and the transfer would pass no interest to the holder claiming under it against the acceptor or maker. But when a part of it has been paid, the balance may be transferred.² A note may be transferred as security for a smaller sum, and the holder can recover the full amount of the maker.³ It is said that if a bill be transferred by endorsement before acceptance, the acceptor may, by special acceptance, render himself liable to two different persons.⁴ If the bill or note be valid in its inception, it may be sold for a consideration less than its nominal amount; ⁵ but in case it is not paid at maturity, and the endorser who transferred it is charged, he is liable only for the sum which he actually received, with interest.⁶ *Aliter* in Georgia, under the statute of that state.⁷ If it is guarantied, on the other hand, instead of endorsed, the guarantor is liable for the whole amount of the note, and not for the amount merely that he received upon his guaranty.⁸

§ 382. A guaranty of the payment, or of the collection of a bill or note, is frequently written upon it. At common law it was held that if the guaranty were written upon the bill or note at the time it was made, and were made to the payee or bearer, it was transferable with it, and an action upon it might be brought by any subsequent holder. Otherwise, if it were not negotiable, and an action could only be brought upon it by the person to whom it was originally given.⁹ Doubts have since been thrown upon the rule.¹⁰ At any rate, now, under the Code of Procedure, requiring all actions to be brought in the name of the parties in interest, all valid guaranties of bills or notes are transferable with the security to which they relate, and actions upon them may be brought by their holders.¹¹ The same rule will prevail wherever the rule has been similarly changed. In the case of a guaranty of collection, the guarantor is liable for the costs of a suit brought to collect the note.¹²

¹ 21 Barb. 241.

² Chitty on Bills, 262. Edw. on id. 280.
281. 37 N. Y. 336. 3 Keyes, 40.

³ 3 Greene, Iowa, 273. 19 Ind. 160.

⁴ Chitty on Bills, 262.

⁵ 13 John. 52. 7 Wend. 569.

⁶ 7 Wend. 569. 20 How. Pr. R. 193, 200.
31 Barb. 241.

⁷ 29 Geo. 455.

⁸ 4 Wis. 190. 21 Wend. 588.

⁹ 19 Wend. 202. 21 id. 588. 24 id. 456.
26 id. 425. 2 Hill, 188. See 3 Mich. 188.

¹⁰ 2 Coms. 533. Id. 553. 20 N. Y.
331.

¹¹ Code of Procedure, § 111.

¹² 3 Keyes, 161.

§ 383. Where the guaranty is that the bill or note shall be paid at its maturity, if the acceptor or maker fail to pay it, the holder may bring his action upon it without demand or notice.¹ If, however, the guaranty be that the note is good, or that it shall be collected, it is necessary, in order to charge the guarantor, that the holder show that it cannot be enforced against him.²

§ 384. It was formerly held in New York, that if a guaranty be made at the time of making the bill or note, and guaranty its payment, the guarantor is liable as a joint and several maker of it.³ This doctrine was subsequently overruled.⁴ But subsequent decisions throw the whole question in doubt, though it is the better opinion that the guarantor will be held liable as such, and not as a joint and several maker of the note.⁵

In Indiana, Texas, Illinois, Minnesota, Ohio and California, it is held that, though in the absence of proof the presumption is that one who writes his name on the back of a note, is an endorser, yet that a party, not being a payee, who endorses a note in blank when it is made, or afterward on a new consideration, is liable as an original promissor or surety.⁶ If there is no date to the endorsement, it is presumed, at least in favor of a subsequent *bona fide* holder, to have been made at the inception of the note,⁷ or the guaranty may be written over the signature at the trial.⁸

In Wisconsin, he is treated as an endorser.⁹

It has been held in our courts that where A., intending to become a surety for C., endorsed his note payable to B. or order, before its delivery to B., B. may write over the endorsement a guaranty; but that an agreement must be shown that it was intended to answer in some other form than as endorser, and the case must be one where he could not be held as an endorser in order to justify it.¹⁰ In a recent case, where F. made his note payable to S. or order, and G. knowing that it was given in pursuance of an arrangement that he should be security for F. to S., endorsed it, it was held that G. was liable as an endorser only.¹¹

§ 385. By the statutes of most of the states, in order to render the

¹ 19 Wend. 202.

² 14 Wend. 231.

³ 24 Wend. 456. 1 Hill, 256. 4 id. 420.

⁴ 4 Seld. 207. 20 N. Y. 331.

⁵ 21 N. Y. 315. 39 Barb. 42.

⁶ 6 Ind. 478. 11 id. 295. 16 id. 236, 265.
14 Texas, 275. 17 Ill. 459. 20 id. 367. 25

id. 91. 8 Cal. 95. 2 Minn. 139. Id. 147.

⁷ 6 Ind. 446. 15 Ohio N. S. 515.

⁸ 6 Ind. 478. 14 Texas, 275. 17 Ill. 459. 2 Minn. 139.

⁹ 17 Ill. 459.

¹⁰ 9 Wis. 516. 12 id. 639. 13 id. 227.

¹¹ 1 Hill, 91; but see 4 Duer, 45.

¹² 2 Hill, 80.

guarantee of a note effectual, it must comply with the provisions of the statute of frauds, and express the consideration on which it is given, in those cases where it is treated as a guaranty, and not as an endorsement or a note. But in New York it is, as we have seen, no longer necessary that it express the consideration.¹ The words "for value received," in cases where it is necessary to express the consideration, would be sufficient for that purpose.² In California and Indiana it is held that such a guarantee is not within the statute, and that the note imports a consideration.³

§ 386. If a bill or note which has been paid by any person other than the acceptor or maker, be re-issued before it is by its terms payable, even in fraud of the parties, it is notwithstanding valid in the hands of a *bona fide* holder, against all parties to it. It is therefore important that one who pays an acceptance or note made by him, should mark it as paid in order to prevent its being again negotiated. The drawer of a bill, or an endorser of a bill or note who has paid it, may however put it into circulation after its maturity.⁴

§ 387. An acknowledgment made by one of the makers of a note after its maturity, of his indebtedness upon it, upon the faith of which a third person purchases it, will prevent him from showing that he signed the note as surety for the other makers, and that at the time of his acknowledgment the *principal* makers had without his knowledge paid it.⁵ This is upon the principle of an *estoppel in pais*, of which mention will be made in treating of evidence.⁶

§ 388. Although a bill of exchange or promissory note of itself imports a consideration which need not be pleaded or proved, and that the holder took it in the usual course of business, in good faith and for value, yet as between immediate parties to it, as the drawer and acceptor, drawer and payee, maker and payee, payee and his endorsee, any total or partial want of consideration, or failure or illegality of consideration, may be shown as a defense.⁷ And in like manner, when the defendant shows that the holder of the bill or note was not a purchaser of it in good faith, or for value paid at the time, or that he purchased it after it had become payable, he may then

¹ Ante, § 127. Sess. Laws of 1863, ch. 464, p. 802. on Pr. Notes, § 180. 9 Foster, N. H. 292. 3 Mass. 556.

² 23 N. Y. 495. 4 Seld. 207. 3 Keyes, 161. 4 Wis. 190. ³ 21 Wend. 172.

⁴ 2 Cal. 485. 25 Ind. 246.

⁵ 3 Camp. 194. 3 Maule & Selw. 95. ⁶ Infra, § 1402. ⁷ 17 John. 301. 7 Cowen, 322. 2 Wend. 431. 12 id. 246. 13 id. 605. Story on Pr. Notes, § 190. Edw. on Bills, 56. Id. 78. 52 Ill. 260.

interpose the defense. The policy of the law is to protect the purchaser of commercial paper (among which are railroad bonds under seal and payable to bearer, and similar securities),¹ who in good faith purchases it before its maturity, parting with value for it, from any defense existing between the original parties to it, except in cases where the statutes make notes given absolutely void, as in violation of the usury laws, or the acts in relation to betting and gaming.² But he must appear with perfectly clean hands in order to avail himself of the character of a *bona fide* holder, and if it appear that he gave nothing, or but a trifling consideration for the paper, so as to make the purchase merely colorable, or that he bought it under such suspicious circumstances as should have put him upon his guard, it will be sufficient to let in any defense which existed between the immediate parties.³ As we have before said, it is presumed that the holder received it before it was due, in good faith and for value.⁴ But if the defendant proves that the paper was put in circulation fraudulently, or is illegal, then the presumption is changed, and the plaintiff must show when he received it, his good faith in the transaction, that he paid value, &c.⁵ It is not enough however, to change the presumption, that the bill is proved to have been without consideration as between the immediate parties, i. e., was accommodation paper.⁶ It is a sufficient consideration that the note was taken as collateral security by one who made advances at the time upon the credit of it.⁷ So when it is taken before due, in payment of a precedent debt.⁸ But one who buys a note against a person in good credit for a small percentage of its amount, as a note for \$300 for \$5, is not a purchase, for value.⁹

§ 389. Within the rules laid down in the preceding section, one who is without any knowledge of the transaction out of which the bill or note originated, may purchase it before it is payable, and recover the amount for which it is given, notwithstanding it was given without consideration, or a blank left for the amount was filled

¹ 19 N. Y. 20. 41 Barb. 9. 10 Bosw. 332. 23 Ind. 353.

² 1 John. 319. 8 Wend. 600. 10 id. 341. 2 Hill, 599. Story on Pr. Notes, §§ 191, &c. Edw. on Bills, 56, &c. 2 Cal. 64. 4 id. 321. Chitty on Bills, 248, &c. 22 Ind. 88. 17 Wis. 61. 18 id. 615. 20 Ill. 557.

³ 4 Hill, 442, 424. Supra, § 278. Chitty on Bills, 242, &c. 30 Ill. 404.

⁴ Ante, § 380.

⁵ 1 Duer, 309. 4 id. 458. 6 id. 309. 4 Coms. 166. 2 Bosw. 613. 11 Cush. 198. 5 Mich. 505. 10 Cal. 523. 12 Ohio N. S. 534.

⁶ 5 Duer, 462. 6 Md. 509.

⁷ Infra, § 389a.

⁸ 11 Minn. 198. 2 Kern. 551. 31 N. Y. 113. 37 How. Pr. R. 534.

⁹ 2 Wis. 473.

with a sum exceeding the limit fixed by the maker or acceptor,¹ or it was given for an illegal consideration, as to compound a felony, or was stolen or procured from the maker through fraud,² or has been diverted from its original purpose,³ or was for any other cause uncollectable by the original payee against the acceptor or maker, or although there was some vicious feature in the consideration passing between the endorser. In such cases as these the defense would be a perfect one between the original parties; and it would also be available against the present holder, if the defendant should first show that such holder purchased it with notice of the defense, or after it had become payable, or that he paid no value at the time for it.⁴ The defendant, however, must rebut the legal presumptions in the plaintiff's favor before he can introduce the particular facts constituting his defense.⁵ If the note is not a valid one in the hands of the payee, and given for an actual consideration, it cannot be rendered valid by a sale thereof to a *bona fide* purchaser for a less amount than upon its face purports to be due thereon.⁶

[§ 389a.] Whether and under what circumstances the taking of a note as security, or in payment of an antecedent debt, is sufficient to render the holder one for value, has been a vexed question. It is now settled in New York and some of the other states, that receiving a note in good faith in payment of an antecedent debt, whether due or not, *the evidences of such debt or a security therefor being at the same time surrendered or destroyed*, is sufficient to make one a holder for value.⁷ If no security, property or other thing of legal value is parted with, he is not a holder for value.⁸ In like manner, where a note is received in good faith as security for a precedent debt, and the creditor at the same time surrenders other securities or relinquishes some rights therefor (though this may not be under all circumstances absolutely indispensable), the creditor is a holder for value.⁹ A person is not a holder for value who holds the pro

¹ 21 N. Y. 531. 41 Barb. 28.

430. 13 Wis. 375. 31 Ill. 166. Id. 538

² 16 Barb. 548. 24 id. 554. 37 id. 458. *Infra*, §§ 464, &c. 11 Minn. 198.

4 Duer, 458.

³ Id. 1 Transcript, 231, and refs. 24

⁴ 20 N. Y. 673. 12 Iowa, 462.

Barb. 554. 43 id. 379.

⁵ 39 Barb. 645. 5 Duer, 485.

⁶ 6 Hill, 93. 17 N. Y. 101. 32 id. 553.

⁷ 5 Mass. 334. 1 John. 319, 8 Wend. 600.

33 Barb. 81. Id. 621. 43 id. 379. 2

⁸ 36 Barb. 585. See 14 Ohio, N. S. 396.

Bosw. 248. 5 id. 192. 8 id. 243. 6 Ohio

⁹ 6 Hill, 93. 31 N. Y. 113. 37 id. 440.

N. S. 448. 8 Cal. 260. 14 id. 94, 450. 28

2 Kern. 551. 1 Transcript, 352. 30 Barb. 246. 31 id. 183. 33 id. 215. 37 id. 458.

Ill. 428. 12 Iowa, 462. 13 id. 589. 15 id. 441. 17 id. 302. 14 Wis. 1. 18 id. 615.

41 id. 28. 43 id. 379. 3 Bosw. 310. 5 id.

17 id. 61.

ceeds of collections against a balance due from the correspondent from whom the collections were received,¹ even it would seem, where the proceeds were credited to the correspondent by his directions.² If the paper is taken under an agreement that it is to be a payment when collected, the holder is not one for value.³

§ 390. One who purchases commercial paper in the ordinary course of business, that is for value, before maturity, without notice of any equities between the original parties, or of any defect of title, is to be deemed a *bona fide* holder. He is not bound at his peril to be upon the alert for circumstances which possibly might excite the suspicions of wary vigilance. He does not owe the party who put negotiable paper afloat, the duty of active inquiry to arrest the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence.⁴ If he has any notice that leads him to inquiry, it is enough that he makes such inquiries as a man of ordinary prudence would do.⁵ If he receives the paper from one who has the legal right to dispose of such a security, he is protected, though the authority was wanting in the particular instance.⁶

It is not enough, in order to admit the defense against a holder of a bill or note who has purchased it before its maturity, and paid value for it, that he was informed that there had passed no consideration between the drawer and acceptor, or the maker and payee, unless he had notice also that the person from whom he received it acted fraudulently in negotiating it. Nothing is more usual than to draw, or endorse, or accept a bill, or to make or endorse a note, merely for the *accommodation* of a friend, and as a loan of one's credit, and in such cases, the purchaser of the bill or note who pays value for it, is protected.⁷ If, however, an accommodation paper was made or endorsed for a particular purpose, of which the purchaser has knowledge, and it be used for any other purpose, it will be invalid in his hands; and if, when made for such purpose, any circumstances have arisen which would render it unjust to the accommodation party to use it, no person aware of the fact, can, by obtaining it, render it available against him.⁸

¹ 26 N. Y. 450.

² 44 Barb. 175.

³ 23 N. Y. 289.

⁴ 34 N. Y. 247. 29 id. 220. 3 Keyes, 166.

⁵ 7 Bosw. 543. 1 Robertson, 538. See 29 N. Y. 220.

⁶ 31 N. Y. 33. 1 Bosw. 203.

⁷ Chitty on Bills, 91. 7 John. 362. 7 Wend. 227. 1 Edm. Sel. Cases, 95.

⁸ Chitty on Bills, 91. 10 John. 231. 15 id. 270. 1 Den. 583. 23 Barb. 18. 6

Duer, 351. See 15 N. Y. 575. 29 id. 673. 12 Iowa, 462.

§ 391. It will not be deemed a diversion of the purpose of a bill or note made to raise money for the accommodation of the payee, or drawer, if it perform substantially the purpose intended. Thus if it be made for discount at one bank, and be there rejected, and discounted at another,¹ or if it be intended to raise money for E. and it was applied by him to pay up a judgment or other debt against him, it will be valid in the hands of the person to whom it is negotiated, although he knew all the facts in relation to it.² A different rule prevails in Ohio, where it is held that such an application is a diversion, and prevents a recovery upon the note.³

§ 392. In the English courts, the original *partial insufficiency* of consideration can be shown where the circumstances permit a defense to a bill or note, but not where there was subsequently to the drawing of the bill or making of the note, a *partial failure* of the consideration.⁴ In the latter case, the party injured is left to obtain his remedy by a cross action. Our courts have, however, established a different rule, and in a case warranting the admission of a defense, the partial failure of the consideration can be shown in mitigation of the recovery.⁵

§ 393. In cases where, as in New York, the statute has declared all contracts and securities given in violation of its provisions void, as in the acts restraining usury,⁶ betting and gaming,⁷ lotteries⁸ and the like, bills and notes founded on such considerations or tainted with them, are void in the hands of *bona fide* purchasers and under all circumstances. The same rule is true in other states where there are similar statutes on these or kindred subjects.⁹

§ 394. Where from his being an original party to the bill or note, or from the manner in which he acquired it, a defense may be interposed against the holder, the total or partial want of original consideration, or its fraud or illegality, or the total or partial failure of the consideration may be shown. The following are illustrations of this class of defenses: A note given by one as administrator, "for value received by my intestate," would be void upon its face in any holder's hands, because upon its face it gives notice that it was given

¹ 4 Cowen, 567. 38 N. H. 166.

⁶ Laws 1837, ch. 430. 3 R. S. (Banks 5th ed.) 73, § 5.

² 5 Wend. 66. 1 Hill, 513, 539. 2 Sand. 115. 5 Den. 329. S. C. 3 Coms. 442.

⁷ 1 R. S. 662, §§ 8, 16. 2 id. (Banks' 5th ed.) 924, 925.

³ 16 Ohio, 282.

⁴ 1 Camp. 40 n. 2 id. 346.

⁸ 1 R. S. 665, § 24. 2 id. (Banks' 5th ed.) 929.

⁵ 8 Cowen, 31. 2 Wend. 431. 43 Barb. 622. 44 id. 42. 8 Florida, 34. 19 Cal.

⁹ 2 Cal. 64. 2 Wis. 237. 7 Ind. 132. 22 id. 88.

147. 27 Ill. 175. Aliter, 5 Minn. 448.

without consideration;¹ and for the same reason one given by a member of the vestry of a church, for a debt due from the church, without any consideration moving to him, would be void.² So a note given for the consideration on the purchase of a patent fraudulently obtained;³ for the price of a chattel fraudulently represented by the vendor to be of value when it is worth nothing,⁴ or when he, at the time of the sale, fraudulently conceals a defect in it,⁵ is void on account of the fraud entering into its consideration. If given for a pretended title to lands, of which the grantor is out of possession, the sale being forbidden by the statute;⁶ or, to induce the withdrawing of opposition to an insolvent's discharge;⁷ fraudulently to reduce the payee's property so as to qualify him to be put on the United States pension roll;⁸ to procure the interest of the payee in favor of the election of the maker to the office of sheriff;⁹ to induce the payee not to bid at the sale of land on execution;¹⁰ to suppress a prosecution for assault and battery, or compound a prosecution for a crime;¹¹ by a loser to a winner upon a bet upon the result of an election, after the polls had closed;¹² to an enemy in time of war;¹³ to secure the continuance of an illicit intercourse;¹⁴ on a consideration in general restraint of trade or marriage;¹⁵ given for property purchased with the intention of defrauding creditors;¹⁶ to induce a defendant to withdraw her defense in a divorce suit¹⁷ for lobby services with members of a legislative body;¹⁸ to a party for influencing a public officer in the discharge of his duties;¹⁹ to be paid when a certain party is elected to a certain office;²⁰ or on a promise that the payee will not give evidence in a pending suit, and will suppress or withdraw depositions in which third persons may be interested,²¹ in these and such like cases the consideration is illegal. And so generally where the agreement on which the note is given is repugnant to the general

¹ 8 John. 120.² 2 Gill & John. 64.³ 8 Mass. 46. 21 Mo. 338.⁴ 15 John. 230.⁵ 2 Hill, 606.⁶ 2 R. S. 691, § 6.⁷ 3 Caines, 213. 9 Mass. 423. 3 Seld. 369. 4 John. 419. 12 id. 306.⁸ 4 Greenl. 415. 6 Mass. 423. 4 id. 372.⁹ 3 Halst. 54.¹⁰ 3 John. Cases, 29. 22 Mo. 333.¹¹ 1 Yerg. 430. 1 Ashmead, 68. 5 Verm. 42. 5 N. H. 553. Ohio (cond.) 842.¹² 8 John. 454. 24 Ind. 25.¹³ 15 John. 57. 16 id. 438. 7 Taunt. 439.¹⁴ 5 Cowen, 253. 4 Denio, 439.¹⁵ Edw. on Bills, 342. 5 Denio, 434. 6 Ind. 200. 6 Cal. 258.¹⁶ 20 Wend. 24. 4 Hill, 424. 10 Barb. 369.¹⁷ 13 Ohio N. S. 223. See 35 Barb. 282.¹⁸ 4 Kern. 289. 34 Barb. 533. 36 id. 474. 5 Wis. 200.¹⁹ 24 Ill. 614. 32 Barb. 518.²⁰ 1 Minn. 94.²¹ 15 Cal. 387.

policy of the common law, or contrary to the provisions of any statute.¹ Where a note is given for a particular purpose which fails or is violated in its negotiation;² as by bail in consideration of a judgment against his principal which is afterward reversed;³ for lands, the title to which had previously been sold upon a judgment, or for goods to which the vendor has no title;⁴ for a conveyance of land void from defect of form;⁵ for the price of an article the property of which never passed;⁶ given by a testator for the trouble the donee would have as his executor, the donee dying before the testator,⁷ or given instead of a receipt to a debtor who pays a part of his debt before it is payable,⁸ or given as the price of goods fraudulently sold and which have been returned, or offered to be returned,⁹ the consideration has failed and the bill or note is void. A note given upon the settlement of a doubtful claim will, however, be upheld on the ground that the compromise furnishes sufficient consideration without regard to the legal validity of the claim.¹⁰ So, liability upon prior endorsements, or an agreement to delay the prosecution of a note, unless it is in violation of the laws against usury, furnishes a valid consideration for a bill or note,¹¹ and a note made or endorsed for the accommodation of another, although without consideration between the original parties, is valid in the hands of the person to whom it has been negotiated with knowledge of the circumstances, on the ground of the consideration passing from him to the maker or endorser upon its purchase.¹²

§ 395. The foregoing rules in relation to the defense of an action upon a bill of exchange may be illustrated by a reference to the bill of exchange, a form of which is given in section 345. Suppose *John Doe*, the drawee, should after having accepted it, refuse payment to *James Jackson*, the payee, and *Richard Roe*, the drawer, should be obliged to pay it himself, and should then bring his action against *John Doe*, the acceptor. *Doe* might show in his defense either that he owed *Roe* nothing, and had received nothing from him in consideration of accepting the bill, and therefore was not bound to pay it; or that he accepted it to hush up a prosecution for stealing, or

¹ 11 Iowa, 133. 12 id. 398. Edw. on Bills, 236. 7 Ind. 132. 11 Wis. 394. 20 John. 399. 34 Barb. 427.

² 10 John. 198.

³ 3 John. 465.

⁴ 11 John. 50.

⁵ 7 Mass. 14.

⁶ 1 N. H. 174. 7 Mass. 14.

⁷ 6 Car. & Payne, 316.

⁸ 7 Cowen, 322.

⁹ 2 Taunt. 2. 2 Hill, 288.

¹⁰ 3 Hill, 504. 18 Ill. 204.

¹¹ 7 Conn. 523. 1 Coms. 274. 3 Mich., 615. 20 How. U. S. 343. See 6 Iowa 350.

¹² 7 John. 362.

for some other illegal purpose ; or that the consideration upon which he accepted it had failed, either wholly or in part ; or that there was never a full consideration for the bill, but only one for a part of it, and thus defeat the whole recovery, or reduce its amount. In like manner, if James Jackson, the payee, on failing to collect the bill from John Doe, the acceptor, should bring his action against Richard Roe, the drawer ; Roe might in the same manner show a *want*, *insufficiency*, or *illegality*, or *failure* of consideration, in order to defeat Jackson or reduce his damages ; and if Jackson had endorsed it to James Stiles, and Stiles should bring his action against him, Jackson might show the same want, insufficiency, illegality or failure of consideration in the transfer from him to Stiles, or he might show that the endorsement was conditional, as that Stiles should first sue the acceptor to judgment and execution, and only look to him in the event of his failing to obtain it in that manner. In the same manner in the case of the promissory note in section 351, if Roe, the maker, is sued by Jackson, the payee, he can show the same things in his defense, either to defeat or reduce the recovery ; and if Jackson had endorsed it to Stiles and Stiles should bring his action upon it against him, he could interpose the same defenses. The reason of the rule in each of these cases is a privity of contract between the immediate parties, and they know, or are presumed to know whether the bill or note is fair and upon a valid consideration. But with regard to the other parties this reason does not exist. They are assumed to be ignorant of the transactions out of which the bill or note arose, and to have purchased it, relying upon all the presumptions of law in favor of its legality, and trusting only to the solvency and responsibility of the original parties to it. They are, therefore, called *innocent* or *bona fide* holders, and the policy of the law is to sustain their claims, however viciously other parties have acted, or whatever objections on account of the consideration may exist. In the case of the bill of exchange, therefore, James Stiles, to whom James Jackson, the payee, had endorsed it, might recover against either John Doe or Richard Roe, the drawer or acceptor, notwithstanding the existence of either of the grounds of defense above mentioned, as between them or either of them, and James Jackson ; and in like manner, the endorsee of the note could have recovered against the maker, notwithstanding either of these defects existing as between maker and payee. But if Stiles, the endorsee of the bill or note, brings his action against the acceptor of the bill or the payee of the note, they may show, 1st, that Stiles paid nothing for it ; or 2d, that though he

did pay for it, he knew or was informed of the defense which existed to it as between the original parties; or 3d, that he purchased it after its maturity, and having shown either of these facts he may prove the defense with the same effect as he might to Stiles' endorser. If, however, the bill or note was endorsed to another person by the payee before it became payable, and was then by him endorsed to Stiles after it became payable, Stiles is not liable to any defense which could not have been interposed had it been sued by his endorser.¹

§ 396. Notes are sometimes made with a view to obtaining the endorsement of a friend for the accommodation of the maker, where the endorser is unwilling to endorse for the whole amount, but agrees in writing to become an endorser for a part of it. In this case, if it be negotiated for such amount, it is held to be an original note for such sum. As if A make his note payable at a certain bank to the order of B, for \$2,500, and B declines endorsing it for that sum, but writes to the cashier of the bank that he will endorse it for \$750, and the note is by him discounted for that sum, it is held to be a note for \$750 only, and under the ancient system of pleading might be declared upon as such.² Where, however, a note is given for a specific sum, evidence that at the time of giving it, it was agreed between the parties that an account which the maker had against the payee should be deducted from it, is not admissible.³ If, however, after the note is made, there be any payment upon it, it can be shown as against the payee, or any one who received it after it became payable.⁴

§ 397. It has been held that if a bill or note payable on demand, or at sight, or so many days after sight, be negotiated so long after its date as from this circumstance alone, or from this and other circumstances combined, to raise a presumption that it has been presented for payment and dishonored, the acceptor or maker is entitled to his defense in the same manner as if it had been payable at a day certain and transferred after that day; that there is no precise time in which the presumption that it has been dishonored will be raised; and that this must depend on the circumstances of the case and the situation of the parties; and that when these are shown the question is one of law for the court to determine.⁵ In one case where there

¹ 1 Camp. 383. 7 John. 361. 11 Wend. 17 Wend. 190.

504. 46 Barb. 170. 1 Hilton, 528. Id. 532. ² 7 John. 70. 9 id. 244. 4 id. 224. 2 12 La. An. 126. 25 Ga. 546. 18 Ind. 464. Caines, 369. 10 Barb. 371, 2. (See 28 id.

³ 17 Wend. 431.

616.) 11 Mich. 501.

⁴ See 5 Minn. 448. Ante, § 109a.

were no peculiar circumstances to explain it, a transfer two and a half months after date, was held sufficient to let in a defense.¹ But a distinction is now drawn between notes so payable, with interest, or without interest, it being held in England, New York (in subsequent cases), and elsewhere, that where they are so payable *with interest*, they are not overdue until an actual demand.² The same rule may yet be applied to those which are thus payable on demand *without interest*. When days of grace are allowed, a note is not overdue until they have expired.³ As we have before seen,⁴ the presumption is that a transfer was made before the note became due. The fact that a note had several endorsements upon it is insufficient evidence of its *transfer* after its maturity.⁵

§ 398. Where a bill or note is payable to bearer, or payable to the order of a payee and by him endorsed to a third person, if the holder transfers it by delivery without endorsement, the effect of the transfer so far as the rights of the acceptor or maker and the transferee are concerned, is the same as if transferred by endorsement. But such a transfer does not create the liability which the law imposes upon an endorser.⁶ As between the parties to a transfer, whether by delivery or endorsement, the law implies a warranty that the holder transferring it owns it, and that the bill or note is not forged, even though the contract was that the transferee should take it at his own risk;⁷ also that there is no legal defense to its collection arising out of his own connection with its origin,⁸ and that it is not worthless to his knowledge by reason of payment, failure of the maker, &c.⁹ In an action brought by the holder upon such a bill or note, it is not necessary to show any other title to it than his possession of it, until the defendant has opened the way for a defense by showing that the plaintiff is not a *bona fide* holder for a valuable consideration, in the same manner as in the case of an action by an endorsee.¹⁰

§ 399. In an action by an endorsee against the drawer, it is a good defense that the plaintiff holds the bill merely as the agent of the payee and for collection, and that the latter has requested the defendant not to pay it to the plaintiff; and the same defense may be set up in

¹ 7 John. 70. Edw. on Bills, 389, &c.

⁶ Chit. on Bills, 271. Edw. on Bills, 249.

² 4 Barn. & Cress. 325. 6 Dow. & Ry. 379. 9 Mees. & W. 15. 23 N. Y. 28. 3 Hill, 582. 27 Barb. 79. 42 id. 50. See 28 Ill. 397.

Story on Pr. Notes, § 117.

³ 8 Iowa, 334.

⁷ 15 John. 240. Edw. on Bills, 188, &c. 19 N. Y. 476. Ante, § 251.

⁸ 20 N. Y. 226. 22 Barb. 516.

⁴ § 380.

⁹ 20 N. Y. R. 287.

⁵ 1 John. 319.

¹⁰ Ante, §§ 380, 388.

an action by a second endorsee against the maker of a note.¹ Formerly, however, an agent might bring an action upon a check or note payable on demand to himself, or to bearer, and the defendant could not defend on the ground that the plaintiff was not the owner.² And it was also held that the owner of a negotiable bill or note might bring an action upon it, in the name of a person having no interest in it, and that it was no defense that it was brought without the knowledge or authority of the nominal plaintiff.³ The Code of Procedure, by requiring that all actions shall be brought in the name of the party in interest, has changed this rule in New York.⁴ Similar rules are now held by the decisions, or are contained in the statute laws of many of the states of the Union, under which, as in New York, the party in interest must bring the action.

§ 400. In New York, previous to the Revised Statutes, no action could be sustained at law upon a lost bill or note which was negotiable, if it had been endorsed or otherwise transferred, whether before or after it was payable.⁵ Now, however, it is provided that "In any suit founded upon any negotiable promissory note or bill of exchange, or in which such note if produced might be allowed as a set-off in the defense of any suit, if it appear on the trial that such note or bill was lost while it belonged to the party claiming the amount due thereon, parol or other evidence of the contents thereof may be given on such trial, and, notwithstanding such note or bill was negotiable, such party shall be entitled to recover the amount due thereon, as if such note or bill had been produced;" "but to entitle a party to such recovery he shall execute a bond to the adverse party in a penalty at least double the amount of such note or bill, with two sureties, to be approved by the court in which the trial shall be had, conditioned to indemnify the adverse party, his heirs and personal representatives against all claims by any other person on account of such note or bill, and against all costs or expenses by reason of such claim."⁶ A check is a bill of exchange within this statute.⁷

§ 401. The statutory provisions contained in the preceding section apply *only* where the lost bill or note is *negotiable*. If it were not, a recovery might be had at common law without the offer of any indemnity, upon simply proving the existence of the note and its

¹ 6 Mass. 430. 10 John. 223.

² 7 Cowen, 174. See 7 Bosw. 649.

³ 15 Wend. 640.

⁴ Code of Procedure, § 111. 7 Bosw. 649.

⁵ 10 John. 104. 2 Wend. 550. 3 Cowen, 303.

⁶ 2 R. S. 406, §§ 75, 76. 3 id. (Banks' 5th ed.) 691, §§ 106, 108. See 28 Cal. 561.

⁷ 3 E. D. Smith, 548. Id. 557. 1 Abbt. 148.

loss.¹ This rule is not changed. And the court will not presume a lost note negotiable. The fact must be proved in order to bring it within the statute.² Where the paper is negotiable and endorsers have been charged upon it, the indemnity must be offered to both maker and endorsers in order to maintain the action.³ To enable the plaintiff to recover, he must by the express terms of the statute show that the note belonged to him when lost.⁴ The giving of the statutory bond in case of the loss of the paper mentioned in the statute, is an indispensable prerequisite to a recovery thereon.⁵ The plaintiff may recover under this statute, although the bill, note or check was lost after the action was commenced.⁶

§ 402. The evidence, at common law, need not be that the bill or note is absolutely destroyed. Proof that it is so lost that the defendant cannot afterwards be compelled to pay the amount to a *bona fide* holder, will authorize a recovery.⁷ But under the statute it must appear that it was lost by time, mistake, or accident; and proof that the party who seeks to recover upon it, deliberately and voluntarily burned it himself, will not authorize the introduction of other evidence of its contents.⁸ If it was accidentally *destroyed* (not simply *lost* as to which case only the statute applies), as where it was burned, a recovery may be had without indemnity.⁹

§ 403. Prior to the Code, it was the rule that in an action upon a lost bill or note, the plaintiff himself was a competent witness to prove the loss, but nothing more. The reason was that the loss was a fact for the court and not for the jury, and did not form a substantial ground for the recovery, but simply excused the production of the best evidence of the demand in order to let in secondary evidence. The existence of the note must then be proved by other competent evidence. And where a party was admitted to prove the loss, his adversary might be sworn to disprove it, and to account for it.¹⁰ But the Code, allowing parties to be witnesses in all cases,¹¹ undoubtedly so changes this rule that the plaintiff may not only swear to the loss, but upon all other questions that can arise relative to the note, or bill, or check in controversy.

¹ 10 John. 104. 3 Wend. 344. R. S. as in last section. ⁵ 1 Abbott, 148. S. C., 3 E. D. Smith, 548.

² 12 Wend. 173. 3 id. 344. 10 John. 104. ⁷ 3 Cowen, 303.

³ 2 Hill, 482.

⁴ 2 Barb. 545.

⁵ 1 Hilton, 530. 2 Barb. 545.

⁸ 12 Wend. 173.

⁹ 16 N. Y. 582.

¹⁰ 2 R. S. 406, § 74. 3 id. (Banks' 5th ed.) 690, § 105.

¹¹ Code, § 399.

§ 404. No distinction is made in this statute between securities lost before or after they become due. Where the lost bill or note is negotiable and it has come into the hands of a *bona fide* purchaser for value before it is payable, and under circumstances which would not excite suspicion in a prudent man, such purchaser can recover upon it, and the original owner who lost it will consequently lose all his right of action;¹ and if it be paid by the acceptor or maker after it is due and without notice of the loss, even to one who is not a *bona fide* holder,* the payment is good.²

§ 405. The loss of a note may be implied from lapse of time.³ In an action brought in 1815 upon a lost note made in 1797, the court held that, after so great a lapse of time it was incumbent on the defendant to show that the note then existed, or that it had been demanded of him.⁴

§ 406. In England it has been held that an action cannot be maintained upon one part of a bill cut in two to be sent by mail, the other half being lost.⁵ It would seem, however, that this case would come within the provisions of the New York Revised Statutes in regard to lost notes, as given *ante*, § 400.⁶

§ 407. Where a part of a bill or note has been torn from it and lost by accident, it is sufficient that, upon the trial, the fact is shown in connection with the portion of the note remaining, when it is offered in evidence.⁷

[§ 407a.] There are statutes in the other states, or decisions, which provide for and regulate recoveries on lost paper therein. It would too much encumber this Treatise to give them in full. It is better, therefore, to leave the justice or practitioner in each state, to refer to the law in the state, without general references to it here.⁸

§ 408. The obligations of the parties to a bill or note, and the manner of enforcing and discharging them, are here examined under the following heads:

1. The obligations of the drawer and endorser of a bill, before acceptance.

2. The obligations of the acceptor of a bill and the maker of a note.

3. The obligations of the drawer and endorser of a bill after

¹ Chit. on Bills, 277. Edw. on id. 308, &c.

⁵ 3 Camp. 324.

² Chit. on Bills, 278, 286.

⁶ See also 6 Wend. 378, disapproving, 3

³ 4 Greenl. 28.

1 Camp. 324, *supra*.

⁷ 2 Ham. 13.

⁴ 2 Gallis. 351.

⁸ See 28 Cal. 561.

acceptance, and of the endorser of a note, and the manner of *charging* them with their payment.

4. The manner in which parties to a bill or note may be discharged from their liability.

5. When the receipt of a bill or note for a precedent debt is a payment.

6. When a bill or note is evidence of money received for the plaintiff's use, or lent, or paid for the maker.

§ 409. (1.) *The obligations of the drawer and endorser of a bill before acceptance.* In drawing a bill of exchange and delivering it to the payee, the drawer agrees absolutely and irrevocably to the payee and every subsequent holder fairly entitled to its possession, that the drawee is capable of binding himself by his acceptance; that he is to be found at the place where he is described to reside in the bill, if a place be mentioned in connection with his name; that upon the bill being presented to him he will accept it in writing upon the bill according to its tenor; and that upon it becoming payable he will, upon presentation for the purpose, pay it. On a failure, in either of these particulars, the drawer upon proper notice will be immediately liable to the holder of the bill for its amount.¹ The theory is, that the drawee has funds of the drawer, and therefore, if he refuses to accept, the drawer should be notified at once, in order that he may take proper measures to indemnify himself.² Where the acceptance is refused, or it be only partial or conditional, or in any manner limited, and the drawer be properly notified of the fact, an action lies against him without waiting to demand payment from the drawee when the bill becomes payable.³ And it will not affect this right, though after the action be commenced the bill be presented for payment.⁴ If the drawee has no funds of the drawer, or be not indebted to him, the drawer becomes liable to the drawee for the money he pays upon the bill, in an action for money paid to his use, but not upon the bill itself.⁵

§ 410. Should the holder of the bill either neglect altogether to present the bill for acceptance, or if accepted, should he neglect to present it for payment at the time and place where it is payable, and in case of non-acceptance or non-payment, should he neglect to give

¹ Edw. on Bills, 378, &c. Chit. on Bills, N. Y. R. 586. 3 Mass. 557. 1 Day, 11. 214. 4 Hill, 211. 44 Barb. 313. 8 Mass. 460.

² 4 Hill, 211.

³ 8 Mass. 460.

⁴ Chit. on Bills, 216. 2 Hill, 227. 27 ⁵ Chit. on Bills, 595, 596. 7 Wend. 227. 21 id. 502. 4 Hill, 212.

notice to the drawer, he thereby discharges him from liability, unless he is able to prove that the drawee had no funds, or as it is legally called *effects*, of the drawer in his hands to pay the bill. The want of effects will excuse the holder's laches in this respect, for there is then no chance that the drawer can sustain any damage for want of presentment or notice that the bill is not accepted or is not paid.¹ But if the drawee have effects to never so small an amount at the time the bill is drawn, even though before acceptance they are appropriated, or if the bill be drawn under such circumstances as might induce the drawer to entertain a reasonable expectation that the bill would be accepted and paid, the drawer is entitled to have it presented, and to receive notice of non-acceptance or non-payment.² Where, however, he informs the payee that he has withdrawn the funds on which the bill was drawn, or forbids the drawee to pay it, of which the drawee informs the payee before it is payable, no demand or notice is necessary.³

Further instances where presentment and notice, or either, are excused, will be found *infra* sections 440, 441, 442.

§ 411. Effects in the drawee's hands, in order to require notice, should generally be money or an indebtedness to the drawer; but actual value in his hands is not necessary where the bill is drawn with a *bona fide* expectation of assets to meet it;⁴ as upon the faith of consignments not yet come to hand, the deposit of short bills or policies, or even title deeds, upon which it is expected money will be raised, a mercantile agreement, or where the drawer has accepted cross-bills,⁵ or where there are mutual dealings and an open account between the drawer and drawee, and the latter has received consignments upon which he has accepted bills, but owing to a fall in the market the consignment is not sufficient to meet them.⁶

§ 412. The liability of an endorser of a bill to his endorsee, and to every one to whom it is subsequently negotiated, is the same as that of the drawer, with this exception: the want of effects in the drawee's hands forms no excuse for not giving the endorser notice of

¹ 28 Barb. 390. 17 Wend. 94. 1 Denio, 367. Chitty on Bills, 800, 356. 1 Hall, 78. 4 Sand. 130. 1 E. D. Smith, 400. Edw. on Bills, 397. 25 N. Y. R. 178. 12 Abbott, 139. 1 Bosw. 235. 7 Ohio N. S. 281. 24 Ill. 182.

² 20 John. 146. Chitty on Bills, 358.

³ 2 Nott & McCord, 251. Id. 257, note a. 4 Mason, 113. 4 Hill, 263.

⁴ 2 Term. 713. 1 Esp. 302, 332. 3 Bos. & Pul. 239. 15 East, 216. 16 id. 43. 3 Barn. & Ald. 619. 4 Cranch, 141. 1 Har. & Gill, 468. 7 Har. & John. 381. 8 Barn. & Cress. 610. 6 Bing. 623. 2 Camp. 503, 40 Ill. 278.

⁵ Chitty on Bills 369.

⁶ Ry. & Mood. n. p. 84. 20 John. 146. 12 East, 171. 16 id. 43.

the dishonor of the bill, although he endorsed it for the accommodation of the drawer.¹ His endorsement is considered equivalent to the drawing of a new bill upon the drawee, excepting that he is in no case liable to the drawee or acceptor.² And the engagement of both drawer and endorser, is generally upon the condition that the bill shall be presented to the drawee for his acceptance, if payable at a day certain at or before that time, and if payable at sight, or at a certain time after sight, within a reasonable time after it is drawn, and that if he fails to accept it; or, after it is accepted, if he fails to pay it at its maturity, that the holder shall give them notice.³ The rule in relation to the necessity of notice is, as in other cases, that where the drawer or endorser can by possibility suffer an injury or damage by the neglect to give notice, they have a right to strict notice, unless it is waived or is forfeited by their own fraud;⁴ but where it appears clearly that they could suffer no injury from the want of notice, it is excused.⁵

§ 413. Neither the bankruptcy, insolvency, imprisonment or death of the acceptor, though known to the drawer, will excuse a presentment for payment and notice;⁶ nor will the fact that the drawee informs the drawer before presentment for payment that he will not pay it.⁷ The demand in case of bankruptcy, insolvency or imprisonment, should be made of the acceptor and his assignee; and in case of his death, of his executor or administrator, if there be one, and if there be neither, at the house of the deceased.⁸ It is held in Indiana that notice of non-payment to a guarantor is unnecessary where the maker of the note is notoriously insolvent.⁹ See *infra* § 442.

§ 414. If the drawee make a conditional or partial acceptance, or in any way qualifies or limits it, so as to differ from the terms of the bill, notice must be given to the drawer and endorsers, in the same manner as if the bill had not been accepted, in order to charge them.¹⁰ The limited acceptance will however be good against the acceptor according to its terms and conditions.¹¹ An acceptance payable at a particular place in the town or city in which the drawer resides,

¹ 7 Mass. 449. Chitty on Bills, 357.

⁷ 3 Camp. 107.

² Chitty on Bills, 267.

⁸ Chitty on Bills, 360, 386, 398. Edw.

³ Chitty on Bills, 301. 1 Pet. 25. 2 id. on id. 487, 488.

⁹ 6 Ind. 162.

170. ⁴ 4 Rand. 558. Chitty on Bills, 481, 484.

¹⁰ Edw. on Bills, 145, 382. 5 Seld. 582.

⁵ 17 Wend. 94. 4 Hill, 263.

13 Barb. 636. 11 Iowa, 57.

⁶ Anth. N. P. 205. 12 Wend. 110. 1 Serg. & R. 334. 16 id. 157. Edw. on Bills, 486. Chitty on id. 360. 14 Wis. 380.

¹¹ Chitty on Bills, 320, 360. 7 Greenl.

126. 11 Iowa, 57.

where the bill is addressed to him generally at that town or city, is good;¹ but making the bill payable at a different place from that in which the drawee resides is a material departure from its tenor, and requires notice of non-acceptance.² If a bill is addressed to the drawee at a particular house, and accepted generally, the presentment must be at that house.³

§ 415. The notice of non-acceptance, as well as the notice of non-payment, which will hereafter be treated of, is good if the bill has in fact been dishonored, although the party giving it had no certain knowledge of the dishonor.⁴ The notice may be given orally or in writing, and if the drawer or endorser to be notified resides in a different place from where the presentment is made, it may be given by folding it in the form of a letter and transmitting it by mail on the same day or the succeeding business day, as on Monday, if the bill was dishonored on Saturday.⁵ Where given by mail, it is provided by statute in New York that it shall be sufficient, if directed to the person to be notified at the city or town where he resided at the time of drawing or endorsing the bill, unless he, at the time of affixing his signature to it, shall in addition thereto specify thereon the post-office to which he may require the notice to be addressed.⁶ The presentment for acceptance, and giving notice of non-acceptance is termed *charging* the drawer or endorser, and unless they are so charged, their liability to pay the bill ceases.⁷ When the bill is accepted, and is not paid on presentment at its maturity, a notice of the demand for payment and of its dishonor, is necessary to charge the drawer and endorser, and in this respect the rule is the same in relation to promissory notes. The doctrine will be more fully examined in considering the obligations of the drawer and endorser of a bill, and of the endorsers of a note after acceptance.

§ 416. (2.) *The obligations of the acceptor of a bill and the maker of a note.* The acceptor of a bill and the maker of a note stand in the same relation to all the other parties to it. In case either does not pay at maturity, they may be sued by the holder or any of the parties who has paid it. And unless it be paid at sight, or at a specified time after sight, it need not be presented for payment before the action is brought, notwithstanding it is payable on demand or at a

¹ 19 N. Y. 477. 31 Barb. 403. 11 Ohio N. S. 29.

² 31 Barb. 403. 13 id. 686.

³ 41 Pa. 214. 3 Ind. 414.

⁴ Edw. on Bills, 614. 4 Ellis & Black.

⁵ Edw. on Bills, 615. 4 Wend. 566. 16 Barb. 146. 2 Hilton, 81.

⁶ Laws of 1835, ch. 141. 3 R. S. (Banks' 5th ed.) 71, § 24.

⁷ Chit. on Bills, 465.

specified time and place. But a tender of payment at the specified time and place will prevent interest accruing and the costs of the action, although it does not discharge the debt.¹ And one case holds that the maker or acceptor may show that he had funds at the specified place in bar of damages and costs.² It is no defense to either acceptor or maker, that the bill or note was not presented until long after it was payable, nor that indulgence has been given by the holder to the other parties. They are liable to pay the amount with interest from the maturity of the bill or note, unless it is drawn to bear interest from a certain day, in which case it is computed from that day.³ If the bill or note is drawn simply "with interest," the interest is computed from its date.⁴ If either express no time when it is payable, it is deemed payable immediately, and interest is also computed from its date.⁵ Where a note is made payable at a certain day without interest, or at a rate less than the legal interest, "and if not paid then, with lawful interest until paid," on default of payment at the day, it draws the rate of lawful interest from its date.⁶ On a note made in one state and payable in another, the interest is recoverable according to the legal rate of the place where it is payable, and upon an acceptance it is computed at the legal rate in the country where it is accepted.⁷ One case holds, that if a note is payable on demand, with interest, it can be allowed only from the date of an actual demand.⁸ If payable at a certain time, with interest, it bears interest from its date.

§ 417. An acceptor of a bill and a maker of a note are not liable to a drawer or endorser for the costs which they have incurred in an action brought against them upon a default in payment.¹⁰

§ 418. *Prima facie* the acceptor of a bill is the principal debtor and liable to the drawer upon it, and cannot therefore bring an action against the drawer upon it, even if it be accepted for his accommodation. If he pays it under such circumstances, his action should be for money paid to the drawer's use, and not upon the bill.¹¹

§ 419. The acceptor of a bill, where the name of the drawer is

¹ 7 John. 248. 8 Cowen, 271. 3 Wend. 13. 15 N. Y. 339, &c. 7 Barb. 652. Lalor, 119. 17 Wis. 459. The rule in England is different, a demand at the place being necessary in such cases. 3 Taunt. 397.

² 41 Ill. 267.

³ 19 Ark. 16.

⁴ 2 Burr. 1077. 1 Stark. 452.

⁵ 8 John. 189, 374. 15 Wend. 308. 3 Denio, 12. 1 Kern. 406.

⁶ 15 Mass. 177. See 11 Ind. 392. 7 id. 184.

⁷ 1 Paige, 220. 2 id. 604. 22 Tex. 108.

⁸ 1 Daly, 155.

⁹ 8 Cal. 145.

¹⁰ 3 Conn. 101. 6 Cranch, 253. 31 Mo. 580.

¹¹ 4 Hill, 211.

forged, is bound to pay it, for the reason that he is bound to know the handwriting of the drawer, and that he cannot be permitted, after acceptance, to dispute it.¹

§ 420. (3.) *The obligations of the drawers and endorsers of a bill after acceptance, and of the endorsers of a note.* After the acceptance of a bill, the engagements of the drawer and of each endorser to the holder, and that of an endorser of a note to the holder are much alike. Each agrees with the holder that the bill or note is genuine, that it was accepted or made by the parties by whom it purports to have been made, was endorsed by all the prior endorsers whose names appear upon it, that it is a valid and legal instrument; and that he is held upon his contract as endorser, although the bill or note was made by a minor, a married woman, by an agent of a principal who died before it was made, or is a forgery.² The endorser, by his endorsement, also agrees that if the bill or note be presented for payment, to the acceptor or maker, at its maturity he will pay it; and, in case he fails to do so, that upon receiving legal notice of the demand for payment and the non-payment, he will pay it.³ The obligation is strictly a conditional one. The bill or note, on the day it is deemed payable, must be presented at the place of payment, if any place is specified, and if no place is specified, personally to the acceptor or maker, or at his place of business, if he has any, and if he has none, at his residence, and a demand of payment made. If there are two or more acceptors or makers, the presentment and demand must be made of each of them, unless they are partners, in which case they may be made of either partner.⁴ If the bill or note is not paid, the drawer and endorsers must be notified of the presentment and demand for payment and of the non-payment, in order to charge them, and if not so charged their obligation ceases.⁵ If a note has been protested for non-payment, and the liability of the endorsers fixed, and the endorsers sell the note, without erasing their endorsement, they will be responsible for its payment, though no notice be given them of its non-payment by the maker.⁶ The endorser's legal liability, as given above, may be either limited or enlarged, at his pleasure, at the time he endorses, providing he includes the same in his endorsement. But if he does not, its legal effect cannot be varied by a contemporaneous parol agreement.⁷

¹ 1 Binn. 27. 19 N. Y. 479.

⁴ 5 Hill, 232. Edw. on Bills, 160, 400.

² 7 Pick. 291. Edw. on Bills, 289., &c. 24 Mo. 594. 7 Ohio, N. S. 281.

378. Story on Pr. Notes, § 135.

⁶ Chit. on Bills, 465.

³ Story on Pr. Notes, § 135.

⁶ 31 N. Y. 441.

⁷ 27 Barb. 489.

§ 421. The notice of demand for payment and of non-payment may, in New York, as in case of the notice of non-acceptance, be given orally or in writing; and if the drawer or endorser resides at a different place from the holder, it may be sent by mail. If by mail, it may be directed to the party sought to be notified, at the city or town where he resided at the time the bill was drawn or endorsed, or the note made or endorsed, unless at the time of affixing his signature to it, he, in addition to the signature, specified the post-office to which he requires the notice to be addressed.¹ Prior to this statute of 1835, the rule in relation to mail notices required them to be sent to the one nearest the party's residence, or where he received his letters.²

§ 422. The presentation for acceptance of bills, and the presentation and demand of payment of bills and notes, may be made by a notary public, who is also authorized to *protest* them for non-acceptance and non-payment; and the Revised Statutes of New York further provide: "In case of the death or insanity of any notary public, or of his absence or removal, so that his personal attendance cannot be procured in any mode provided by law, the original protest of such notary, under his official seal, upon such seal and his signature being duly proved, shall be presumptive evidence of the fact, of any demand of acceptance or of payment, therein stated."³ A subsequent statute further provides that "in all actions at law, the certificate of a notary, under his hand and seal of office, of the presentment by him of any promissory note or bill of exchange for acceptance or payment, and of any protest of such bill or note for non-acceptance or non-payment, and of the service of notice thereof on any or all of the parties to such bill of exchange or promissory note, and specifying the mode of giving such notice, and the reputed place of residence of the party to whom the same was given, and the post-office nearest thereto, shall be presumptive evidence of the facts contained in such certificate; but this section shall not apply to any case in which the defendant shall annex to his plea, an affidavit denying the fact of having received notice of non-acceptance or non-payment of such note or bill."⁴ Among commercial men the practice is to leave bills and notes either with a bank which employs a notary, or with a notary himself, for presentation and demand of payment, and charging the drawer and endorsers, instead of attend-

¹ Laws of 1835, supra § 415.

² 2 R. S. 283, § 46. 3 id. (Banks' 5th ed.)

³ 11 John. 231. 5 Denio, 329. 3 Coms. 474, § 34.

442. 4 Barb. 324.

⁴ Laws of 1833, ch. 271. § 8, 3 R. S. (Banks' 5th ed.) 474, § 35.

ing, themselves, to the demand and giving of notice. A notary public cannot delegate his official authority to another;¹ and therefore when it is shown that he did not perform the service, or the certificate given by him necessarily implies that he did not (as when it stated that he "*caused*" it to be done), the certificate is not evidence.² But the facts of the presentment and giving of the notice may be proved by the person who in fact did it for him.³ The notary also may be sworn instead of using his certificate, or other competent evidence may be given of his action in the premises.⁴

[§ 422a.] We have above given only the New York statute relative to notarial certificates. It would take too much room to give the statutes or other rules relative to such notarial certificates or notices, in the other states.

§ 423. Where the time of payment is not specified in a bill, check or note, it is payable immediately upon presentation.⁵ When such bills or notes are endorsed to the holder, if he wishes to charge the drawer, or an endorser, he must be diligent in presenting them for payment. The general rule is, that they must be demanded within a *reasonable* time after they are negotiated, and the question what is such reasonable time, depends upon the circumstances of each particular case;⁶ as the distance of the parties from each other, the frequency of the mails between them, the business and affairs, or the health of the holder. He is not compelled to present such a bill or note, or a check, or a draft, on the same day it is issued and received by him, but he may in all cases defer doing it to any time during business hours of the next business day.⁷ It is, however, prudent where the parties reside in the same place, to present it for payment the next morning after it is received, and if the acceptor or maker resides at a distance, to transmit it for payment by the next mail. It will, however, be sufficient in such case if it is mailed, for the purpose of having it presented, on the day after it is received.⁸ But unless there is some substantial reason to excuse it, it must not be delayed beyond that day.⁹ It need not be sent by the most direct

¹ 3 Hill, 53. 4 id. 129.

² 3 Hill, 53. 3 Seld. 266.

³ Seld. 266.

⁴ 15 Wis. 253. 22 Ill. 535.

⁵ 7 Ind. 1. 6 id. 437. 24 Cal. 329.

⁶ 47 Maine, 112. 11 Mich. 501. 12 Cal. 308.

⁷ 3 John. Cas. 5, id. 259. 2 Caines, 369. 6 Cowen, 484. 7 id. 705. 18 Wend.

133. 31 N. Y. 382. 26 Barb. 651. 34 id. 249. 52 id. 328. 2 Bosw. 500. 1 Robertson, 375. 2 Hilton, 272. 5 Cal. 228. 12 id. 308. 24 id. 329. 46 Ill. 435. Chitty on Bills, 412. Edw. on Bills, 386.

⁸ Chitty on Bills, 415, 16 and 17. See 28 Barb. 616.

⁹ 9 Mart. (Lou.) 326. 2 Marsh. 454.

route, if that is not the customary method of transmission between the two places. A bank check is within the rule governing other bills in relation to charging endorsers.¹ If a note is payable in installments, and a demand is not made on the maker until the last is due, and then the demand is made for the whole, an endorser will be charged for the last installment only.² The books are full of cases where in given instances, it has been held that the presentment was, or not in a reasonable time. They are not more particularly referred to, as the general rule to be deduced from them is as stated above. A note payable on demand "with interest," is a continuing security, and no delay in presentment is, of itself, sufficient to discharge an endorser.³

§ 424. The rule in relation to delay laid down in the preceding section is operative between immediate parties; but the ultimate presentment of a bill or note, payable on demand, cannot be delayed an unreasonable time, by successive transfers between numerous parties, and by each party transferring it to another on the day after he received it. If by such a proceeding, an unreasonable delay is occasioned, the parties first transferring the bill or note would probably be regarded as discharged from their liability. And if there were the least reason to doubt the solvency of the drawee or maker, a holder who should not present it, or forward it for presentment and payment in due season on the next day, or transfer it, would forfeit all claim upon the person who had endorsed it to him.⁴

§ 425. At common law where acceptances or notes are payable at a specified time after sight, or at a specified time after date, or upon a particular day, a certain period is allowed after the time limited for the payment of the note. This in this country is three days, which are termed *days of grace*.⁵ Thus an acceptance payable at a specified time after sight, is in fact payable on the third day after it is seen and accepted. If it be accepted on the first of the month, it is payable on the fourth, and so with a bill or note payable at any specified time. Where, however, the last day of grace falls upon Sunday, or on any holiday, or on any day on which by usage or statute, presentment may not or cannot be made, the previous day is considered as the last day of grace.⁶ Where Sunday and one of the

¹ 20 Wend. 192. 21 id. 372. 4 Cal. 35. on id. 403, 404. 2 Cowen, 766. 8 id. 203.

² 24 Cal. 379. 4 Seld. 190. 4 Cal. 35. 5 Ohio, N. S. 13.

³ 23 N. Y. 28. 11 id. 89. 10 Iowa, 2 With. 461. 19 Ill.

⁴ Chitty on Bills, 413, 414. 11 Mich. 598.

⁵ 2 Caines, 343. Edw. on Bills, 529. 2

Edw. on Bills, 517, &c. Chitty, Hill, 587. 4 id. 129.

other days succeed each other, it would seem that there would be but one day of grace, as where a note was by its terms payable on the first of July, and the third was Sunday, the fourth being also excluded, the note should be demanded upon the second.¹ In New York, by a recent statute (Laws of 1865, page 260, chap. 146, § 1), any day appointed or recommended by the governor of the state, or the president of the United States as a day of fast, or thanksgiving, July 4th, Christmas, new year's day, February 22d; "and when said fourth of July, twenty-fifth of December, first day of January, or the twenty-second day of February shall occur on Sunday, then the ensuing day thereto, shall, for all purposes whatsoever, as regard the presenting for payment or acceptance, and of the protesting and giving notice of the dishonor of bills of exchange, bank checks, and promissory notes, made after the passage of this act," be treated as Sunday. And all such paper which but for this act would be due on any of the mentioned days, shall, when said days fall on Sunday, become due and payable on the succeeding Tuesday. Although an acceptance or note payable *at sight* is usually, also, allowed days of grace,² yet it has been questioned by high authority, whether they are allowable in such cases in the absence of local custom or positive statute.³ And, in New York an express statute has been passed, as follows: "All bills of exchange or drafts, drawn payable at sight, at any place within this state, shall be deemed due and payable on presentation, without any days of grace being allowed thereon."⁴ This statute also goes further, and in section 2 provides, that "all checks, bills of exchange or drafts," appearing on their face to be drawn on any bank or individual banker, "which are on their face payable on any specified day, or in any number of days after the date or sight thereof," shall be due and payable at the day without grace, "and it shall not be necessary to protest the same for non-acceptance."

§ 426. Where days of grace are allowed, the acceptor or maker has the last of them in which to pay the bill or note, and he cannot be sued upon it until the day after.⁵ A presentation and demand, therefore, must be made upon the last day of grace, in order to charge the drawer or endorser. If made at any previous day, it is a nullity,⁶

¹ Edw. on Bills, 529, &c.

² 28 Mo. 345.

³ 1 E. D. Smith, 505.

⁴ Laws of 1867, chap. 416, § 1. 3 R. S. (Banks' 5th ed.) 71, §§ 27, 28.

⁵ Chitty on Bills, 402, 406, 7 and 8. Edw.

on id. 525. 3 Wend. 170. 40 Barb. 104.

41 id. 33. 11 Smedes & M. 452. 14 Ill. 55.

11 Ala. 286. 8 Cal. 626.

⁶ Edw. on Bills, 505, 506, 511. Chitty on Bills, 402. 12 John. 423. 8 Iowa, 394.

3 Cal. 144. 5 id. 393.

and it is not helped by the notice stating the demand to have been made on the proper day. This is the case also where the bill or note is not negotiable; that is, they cannot be presented till the day they are due.¹

[§ 426a.] Checks, drafts, notes not payable at a specified time and non-negotiable notes are not entitled to any days of grace.² And also in New York, by Session Laws of 1857, ch. 416, referred to *ante* § 425, all checks, bills of exchange or drafts drawn on any bank, banking association, or individual banker carrying on banking business under the banking act, which are payable at a future day or time, are payable without grace, and on that day or at that time.

§ 427. When a bill or note is drawn payable at a certain time after sight, or after demand, or after date, or after a certain event, the day of presenting the bill for acceptance, or the note for payment, or its date, or the happening of the event, is to be excluded in computing the time.³ Thus, if a bill payable ten days after sight, be accepted on the first day of the month, the ten days would expire on the eleventh, and the addition of the three days of grace would extend the time when it became actually payable to the fourteenth. So if a note dated the first day of September, be drawn payable at two months after date, the two months would expire on the first of November, and the days of grace being added, it would be actually payable on the fourth day of November; and before that day no demand can be made which will charge an endorser, unless there should be a less number of days of grace by reason of the last one or two being excluded by reason of their being Sunday or another excepted day.⁴

§ 428. In the computation of time in a bill or note, a month is taken to be a calendar month,⁵ and the period from the first or any other day of any month, to the corresponding day in the next month, is regarded a month, and where one month is longer than the succeeding one, it is not necessary to go into a third month in order to complete the period. Thus, where a bill dated on the 28th, 29th, 30th or 31st of January, is drawn payable one month after date, the month in each case will, in ordinary years, expire on the 28th day of February, and in the last three cases, on the 29th

¹ 6 Term R. 123.

² 1 R. S. 606, § 4. 3 id. (Banks' 5th ed.) 826.

³ Edw. on Bills, 523, 525. 4 Seld. 190.

37 Mis. (8 George,) 567. 21 Cal. 393. 32

⁴ Bosw. 298.

id. 347. 2 Wallace U. S. 177.

⁵ Edw. on Bills, 514, 515, *supra* § 425.

day of February in a leap year,¹ and the days of grace are then to be added.

§ 429. If the bill or note be payable at a certain place, in order to charge the drawer and endorsers, it must be presented there, and demand of payment made upon the last day of grace, and if not paid, notice of the presentment, demand of payment and non-payment, must be given to them on the same day or the next day.² If the note is presented for acceptance (the same being payable a specified time after date, or on a day certain), on the day it is due, no further demand of payment is necessary, to charge the endorser.³ If the note be payable at a bank, it is sufficient if it be left there for collection upon the day it is payable.⁴ And if so left, it is a sufficient demand, though, the maker having no funds, it was returned to the holder before the expiration of the last business hour.⁵ It is necessary that the bill or note be present when the demand is made, so as to be ready for delivery upon its being paid, and this is so, although the maker is insolvent and is absent from the state.⁶ It is prudent always to leave a bill or note with a notary public to make the presentment and demand of payment, and if it be dishonored, to protest and give notice to all parties to it, in order that his certificate may furnish convenient evidence that they were charged, in case it becomes necessary to bring an action upon it.⁷ It is not necessary, however, that the presentment and demand be made by a notary; any person may be authorized by the holder to do it, and give the notice to the party to be charged.⁸ If a demand is made at the place designated by the maker, of a person who represents himself to be the maker, it is *prima facie* sufficient.⁹ So if notice is left with a clerk in a store, carried on by a person of the same name as the endorser, the maker telling the notary that the endorser resided there, it is good, although the endorser's store was elsewhere in the city.¹⁰

§ 430. If it be not payable at any particular place, it must as a general rule be presented to the acceptor or maker personally, or at his place of business, or his dwelling-house, and the demand for pay-

¹ Chitty on Bills, 406. Edw. on id. 515. 112. Lalor, 119. Edw. on Bills, 496, 17 Ind. 220. See 7 id. 219. 497.

² Edw. on Bills, 496. 12 Abbott, 139. Sess. Laws N. Y. 1857, referred to ante, §§ 425, 428a. 7 Cal. 166. 8 id. 626. 19 John. 391. 44 Barb. 69.

³ 27 N. Y. 586. 3 John. 202.

⁴ 7 Wend. 160. 6 Mass. 524. 2 Hall,

⁵ 25 N. Y. 178.

⁶ 12 Pick. 132.

⁷ See ante, § 422.

⁸ 18 John. 230, 3 Seld. 269.

⁹ 3 Seld. 266.

¹⁰ 32 Barb. 542.

ment there made, in order to charge the drawer or endorsers.¹ It will make no difference in the rule, if his residence be in a foreign state or country at the time the bill be accepted or the note be made.² If the acceptor or maker resided within the state when the bill was accepted or the note was made, and he afterward removes to a foreign state or country, a presentment and demand need not be made at any place;³ if he has only changed his residence to another place within the state, the demand must be made there.⁴ If he should abscond or have no known place of residence, no presentment or demand is necessary.⁵ If the notary goes with the bill to the maker's or acceptor's residence, to make the demand, but finds the doors closed, and no one there to answer it, this is a good demand.⁶ It is a general rule that service at the place of business must be during business hours; but service at the residence may be made at any reasonable hour.⁷ That the drawer or endorser has gone on business to a distant city, to be absent several weeks, is not such an absence or change of residence as to allow notices to be sent to him at that city.⁸ If the maker of a note payable at no particular place, make an assignment, and his assignee carries on business at the maker's old place, still the demand must be made at the maker's place of residence.⁹ It will not excuse a personal presentation, if the acceptor or maker after endorsement, without the knowledge of the endorser, make a memorandum on the bill or note that it will be paid at a particular place and the holder should present it there, if the acceptor or maker be not there at the time.¹⁰ A parol agreement made at the time a note was made, that it should be payable at a certain place, although none be specified in it, will not be sufficient to warrant the presentation there.¹¹ If a bill be accepted or a note be signed by an agent, the principal being abroad, it may when payable, be demanded of the agent, if his principal shall continue abroad.¹² If by partners, and one of them have died, the presentment and demand of the sur-

¹ Edw. on Bills, 495, 6. Chitty on id. 398. ¹¹ Iowa, 476. 30 N. Y. R. 309. 37 id. 634. 19 John. 391. 6 Ohio, N. S. 542. 19 Ill. 598. 33 Mo. 421. 14 Wis. 408.

² 3 Denio, 145. 1 Coms. 321. Edw. on Bills, 485.

³ Edw. on Bills, 159, 485. 24 N. Y. 28. 30 id. 309. 14 John. 114. 17 N. H. 27. See 14 Wis. 380.

⁴ Story on Pr. Notes, § 236.

⁵ Edw. on Bills, 159, 484, &c. 2 Sneed. 425. 33 Mo. 567. 3 Denio, 145. 4 Mass. 45.

⁶ 23 How. U. S. 368.

⁷ 14 Wis. 408.

⁸ 14 Ohio, N. S. 89.

⁹ 5 Duer, 226.

¹⁰ 19 John. 391,

¹¹ 8 John. 192.

¹² 2 Taunt. 206. 8 Mass. 260. 2 Caines, 121.

vivor at his place of business is sufficient.¹ But notice to one of several joint endorsers would, it seems, not be notice to all.²

§ 431. No particular form of words is necessary in presenting a note or bill and demanding payment.³ All that is requisite, is that it should be exhibited to the person who should pay it, or in the cases where he cannot be found, and the presentment is permitted at his place of business or residence, that it be there exhibited, and when exhibited, words made use of indicating distinctly a request or demand of payment.

§ 432. If the acceptor of a bill or maker of a note die before its maturity, the presentment and demand must be made of his executor or administrator, if there be any, and if none, then at the house of the deceased.⁴ If he has failed and made an assignment, for the benefit of his creditors, the demand cannot be made of his assignee.⁵

§ 433. Where a bill or note is made payable at a bank which is accustomed to close at a particular hour in the day, the holder is bound to be acquainted with its usages, and must present the instrument for payment during its business hours, or within the time allowed by the bank for that purpose.⁶ Indeed, the doctrine that parties dealing with a bank are bound by its usages, has been held to incorporate such usages into the contract between them in a variety of other cases, where the usage is known to them; as where the custom of the bank is to present bills and notes on the *fourth* instead of the *third* day, or where it treats a particular day as a holiday, though it is not legally known as such, and makes demands and gives notices on the previous day.⁷ Although the general rule as to presentment is as above stated, yet a presentment at a later hour, even in the evening, is good, if there be an officer of the bank there to answer it;⁸ and so is one at the bank door, after business hours, when the notary cannot obtain admittance, if the maker has no funds there.⁹ The maker, however, has the whole day to pay in; though he at first refuses, and the notice of non-payment is served, he may subsequently, and on the same day make the payment.¹⁰ If the note is not payable at bank, the notice may be given at the close of the usual business hours, or if there are none, then after sunset.¹¹

¹ 2 Hill, 635.

⁷ 19 Mass. 155. 15 id. 303. 4 id. 245.

² 16 Wis. 495. 7 Ohio, N. S. 281. In- 6 id. 249. 3 Pick. 414. Edw. on Bills, fra § 437. 519, &c.

³ Infra, § 434.

⁶ 17 N. Y. 46. 3 Met. Ky. 304.

⁴ Chitty on Bills, 888.

⁸ 17 N. Y. 46.

⁵ 11 Md. 148. 5 Duer, 226.

¹⁰ 41 Barb. 33.

⁶ 17 John. 248. 17 N. Y. 46. 4 Cal. 28.

¹¹ 4 Cal. 28.

8 id. 626. 3 Met. Ky. 304.

§ 434. Except in the cases already mentioned where a notice to the drawer is excused, and except in the case of a bill of exchange where the drawer and endorsers were charged upon the drawee refusing to accept it, in which case, no further proceedings are necessary in order to render them liable, the holder of a bill or note, must, on its non-payment, if he would render the previous parties to it liable, give them notice thereof.¹ This is necessary, as well when the acceptor or maker cannot be found, as when they are found and refuse to pay.² It is not necessary that it should be in any particular form, but it must import distinctly that the bill or note has been presented for payment and payment refused or neglected.³ A statement therein that the bill or note is protested for non-payment, is sufficient to show a presentment and refusal of payment, especially when there is added that the holder looks to the endorser for payment.⁴ It may be oral, or in writing.⁵ It may be given by the holder himself, or by any other person,⁶ but as it is necessary to prove it in an action upon the bill or note, it is safer to have this done by a third person who can be a witness. If the notice was an oral one, and it appeared from the conversation, at the time, that the endorser knew what note was referred to, the notice is sufficient, though the note was neither produced nor specifically described.⁷

§ 435. The notice is usually in substantially the following form :

“ To Mr. JAMES JACKSON :

The note made by Richard Roe [or the bill drawn by James Den on Richard Roe], dated May 1, 1869, and payable to the order of John Doe ten days after date, and by you endorsed, has this day been presented to the maker [*or if a bill*, to the acceptor], and payment thereof demanded, but it was and is unpaid and dishonored. I am the holder thereof and look to you for its payment.

Dated May 1, 1869.

Yours, &c.,

JOHN STILES.”

This notice must be signed, but the signature may be a printed one.⁸ It is desirable that the bill or note should be described with

¹ § Infra, 436. Supra, § 429.

² 1 McCord, 339.

³ 2 Hill, 587. 1 Coms. 413. Edw. on Bills, 595, &c. Supra, § 431. 14 Cal. 160. 4 id. 213. 22 N.Y. R. 114. 5 Seld. 279. 2 id. 19. 50 Barb. 44.

⁴ 2 Kern. 551. 1 Coms. 413. 1 Wis. 264. 9 Mich. 209.

⁵ 4 Wend. 566. 16 Barb. 146. 2 Hilton, 81. 14 Cal. 160. 14 Iowa, 299.

⁶ 22 Ill. 535.

⁷ 14 Cal. 160. 16 Barb. 146.

⁸ 28 N. Y. 546, 561. 44 Barb. 312. Edw. on Bills, 629.

certainly in the notice, in order to leave no question in relation to it. If, however, it reasonably apprize the party of the particular paper upon which he is sought to be charged, it is sufficient,¹ and if sufficient in this respect, it is not bad, although there be a mistake in it which is not calculated to mislead the party on whom it is served, as an error in the date, amount, name of maker or acceptor.² It should show, affirmatively, a presentation to the person upon whom the demand of payment should properly be made, and that person's name.³ If it correctly describes the note, this is sufficient, although it does not state its number, and it appears there were several other notes outstanding at the time precisely like it, and the number was the only means of making a precise identification.⁴ If the notice describes the note in some particulars, it may be shown that there was no other note in existence to which that description could be applied.⁵ It is sufficient that the notice, dated the day the note is payable, states its amount and the names of the parties, there being no proof that any other note existed to which the notice might refer.⁶ It is a rule in these cases "that if facts exist which render" a notice "uncertain or equivocal, and the knowledge of these facts is confined to the endorser, or is not brought home to the holder of the paper, the notice is sufficient to charge the endorser."⁷ Notices have been held insufficient when the note fell due September 9, and the notice was dated the tenth, and stated that the note "was *this day* protested;"⁸ where the endorsers were notified that the note "had not been paid, and that they would be held responsible for the payment thereof," but not stating any demand;⁹ and where the demand was made at maturity, but the notice stated it to have been made on a different day.¹⁰ But where the endorser wrote the initial of his Christain name so blindly (though in his usual manner), that the notary in good faith read the initial A. C. instead of M. as it really was, and so directed his notice, it was held sufficient.¹¹ In cases of mistake, when the notice is sufficient on its face, the question whether the misdescription misled the party, is a question of fact.¹² Where,

¹ 19 N. Y. 518, 520. 28 id. 559. 22 id. 559. 22 N. Y. 121. 28 id. 36 id. 100. 1 Transcript, 75. 4 id. 545. Id. 561. Bosw. 532. 6 id. 179. 4 Cal. 213. 9 Mich. 209. ⁷ 28 N. Y. 561. ⁸ 44 Barb. 312.

² 1 Coms. 413. 2 Seld. 19. 11 Texas, 585. 6 Ohio, N. S. 542. ⁹ 11 Md. 148. Also 50 Barb. 44. ¹⁰ 5 Cal. 393.

³ 11 Wis. 56. 19 N. Y. 518.

⁴ 22 N. Y. 114.

⁵ 1 Coms. 413. 2 Seld. 19.

¹¹ 30 N. Y. 226.

¹² 5 Barb. 681. 1 Coms. 413. *Infra*, § 438, sub. 8. Edw. on Bills, 613.

however, there is no question about the facts, the sufficiency of the notice is one of law, and should not be left to the jury.¹

§ 436. The notice must be given by the holder or some one authorized by him, or by one who is liable as an endorser. It is not enough if given by one who is a stranger to the bill or note.² The holder may give the notice to any or to all the earlier parties to it, and thus charge such of them as he pleases, and each one so charged is liable individually to him upon it. And any one who is charged, upon paying it may call upon any of the earlier parties who have been charged, the rule being that the notice enures to the benefit of all the antecedent parties.³ It is, however, prudent for each party, upon receiving notice of the dishonor of a bill or note, immediately to give fresh notice to each of the parties who would be liable over to him, for as the holder need notify only such as he pleases, it may be that he has charged no one else.⁴ Such notice an endorser may give on the day he receives notice of the dishonor, or the next business or secular day after, if the party reside in the same town, or by the next business day's mail, if in a different place, as on Monday if the notice is received on Saturday. If sent by mail, it must be by the next convenient and practicable one.⁵ If no mail leaves on the day after notice is received, or the paper is dishonored, it is sufficient to put the letter into the post-office in time to go by the next mail thereafter.⁶ It is the practice in some states for the notary to inclose notices for all the parties to the last endorser, he being the only one whose residence is supposed to be known to the holder.⁷

§ 437. An agent or one who has received a bill or note for collection merely, is considered as the real holder for the purpose of receiving and transmitting notice of its dishonor.⁸ In Massachusetts it was held that a notice to the drawer from the drawee of his non-acceptance of a bill was not sufficient to charge him.⁹ In the English courts, however, notice of the dishonor of a bill from the acceptor to the drawer was held sufficient in an action by the endorser against the

¹ 2 Hill, 587. 5 Barb. 490. *Infra*, § 438. 615, &c. 2 Camp. 208. 1 Hill, 263. 21 sub. 8. *Edw. on Bills*, 612. N. Y. 485. *Story on Pr. Notes*, §§ 321,

² 3 Wend. 173. 16 N. Y. 239 44 Barb. 324. 7 Bosw. 466. 6 Ohio, N. S. 542. 8 312. *Edw. on Bills*, 476, 626, &c. *Chitty Cal.* 626. ⁵ *Edw. on Bills*, 622. *Chitty on id.* 521.

³ *Chitty on Bills*, 528. *Edw. on id.* 627, 9 Ind. 281.

&c. 25 Barb. 138. 17 Wis. 151. 23 Mo. ⁷ 3 Ind. 176. *Id.* 216.

213. ⁸ *Edw. on Bills*, 629. 2 Hall, 112. 44 Barb. 312.

⁹ 5 Cowen, 303. 34 N. Y. 128. 3 Ind. 216 ⁹ 14 Mass. 116.

⁹ *Chitty on Bills*, 522, &c. *Edw. on id.*

drawer.¹ It is not sufficient notice to leave the note with the endorser who is an attorney, for collection of the maker.² Where two or more payees endorse their individual names, and not as partners, it is necessary to give all notice, in order to charge either.³

§ 438. The following is a synopsis of the rules, governing the manner of serving notices of non-acceptance and non-payment, upon the parties to bills or notes in the several cases which ordinarily arise.⁴

1. At common law, where the party to be notified, resides in the city or town where the bill or note is payable, the notice should be delivered to him personally, or left at his place of business or residence.⁵ But if his name is not on the directory of the city in which he resides, and neither his residence or place of business can be ascertained, by the person employed to give the notice, after diligent inquiry, the notice is waived.⁶ If the notice is left at the endorser's place of business, in business hours, it is enough that it is delivered to a person in the office, although there is no proof that he was in the endorser's employ, and the notary made no inquiry relative thereto.⁷ But leaving it at the hotel where he resides, it not appearing that it was given to any one authorized to receive it, nor that the endorser was then in, nor that any inquiry was made for him, nor that the notice was handed to any one to deliver to him, is insufficient.⁸

By statute, however, the rule in New York has been so changed that the notice may there be served by depositing it, properly directed, and prepaid, in the post-office of the city or town where the party to be served resides, or whenever that place is indicated by him as his residence, under his signature or endorsement, or whenever, after diligent inquiry he is reported to reside or have a place of business there, provided that was the place where the promissory note or other security was payable, or legally presented for payment or acceptance.⁹

2. Independent of the above statute, where he resides in the same

¹ 4 Camp. 87. But this case has been criticised, and is undoubtedly against the general rule. In Bayles on Bills, 5th ed. 254, it is said that it "might, perhaps have been on the ground that the acceptor wrote for the plaintiff, and as his agent." See Story on Pr. Notes, § 303 in note (3). 44 Barb. 314.

² 11 John. 180.

³ 4 Cowen, 126.

⁴ See ante, § 430.

⁵ 10 John. 490. 11 id. 231. 20 id. 372. 4 Hill, 129. 5 id. 236. 3 Kern. 549. 6 Cal. 435.

⁶ 3 Seld. 266. If no inquiry was made of the holder it would be insufficient. 5 Duer, 82.

⁷ 4 Duer, 212.

⁸ 15 Ark. 415.

⁹ Laws of 1857, ch. 416, § 2. 3 R. S. (Banks' 5th ed.) 71, § 29. 34 Barb. 452. 25 id. 138. 9 Bosw. 305, 7 id. 466. 39 N. Y. 187. 6 Transcript, 159.

city or town where it is payable, but has made a temporary removal, the notice may be left at his last place of residence,¹ and if that be shut up and he be gone out of town, it may be directed to him and deposited in the post-office.²

3. Where he resides in a different city or town from that where it is payable, the notice may be sent to him by mail directed to that city or town, unless he has, upon the instrument, directed it to be sent to a different place.³ If he adds to his direction both street and number, the notice must be sent there, and one directed to him generally is insufficient.⁴ If the notice is deposited in the post-office of a place where the endorser does not reside, not for the purpose of transmission, by mail, but merely as a drop letter, it is not sufficient to charge him.⁵ The letter may be directed to the post-office where he is accustomed to receive his letters as well as to that where he resides.⁶

4. When an endorser, after his endorsement, has removed from the place where he then resided, and the holder and his agent had no notice of his removal, a notice by mail directed to the former place of residence, is good.⁷ This rule is so far modified, in New York, by the statute of 1835 (referred to in sub. 3 *supra*), as to make it sufficient to send the notice to the place of residence where the note was made, regardless of knowledge, or not, that the person sought to be charged has removed therefrom.

5. Where his residence is unknown, the holder or his agent must use due diligence in order to ascertain it.⁸ He should inquire of others whose names appear on the instrument, or others of the same name if any, or of business men likely to know and who are not interested to mislead him.⁹ An enquiry in the post-office or a bar-room, of persons whom he cannot recollect, is not enough.¹⁰ If he cannot ascertain the place he must send the notice to the place where the note is dated. If no place appears on the face of the bill or note, he must send it to the place, where, according to the best information, the endorser will probably be found.¹¹

¹ Ante, § 430. 2 Caines, 121.

² 2 John. 274.

³ Laws 1835, ch. 144. 3 R. S. (Banks 520. 3 Coms. 272. 16 N. Y. 235. 20 id. 5th ed.) 71, § 24. 5 Denio, 329. 3 Coms. 407. 30 id. 226. 32 Barb. 542. 21 Ind. 442. 25 Barb. 183.

⁴ 9 Bosw. 305.

⁵ 4 Mich. 391.

⁶ 4 Barb. 324. 3 Seld. 481. 14 Ohio, N. S. 89.

⁷ 3 Wend. 408. 5 id. 587.

⁸ 13 John. 432. 24 Wend. 358. 3 Hill, 520. 3 Coms. 272. 16 N. Y. 235. 20 id. 407. 30 id. 226. 32 Barb. 542. 21 Ind. 58. 33 Cal. 176.

⁹ 2 Sand. 178. 2 Hill, 587.

¹⁰ 3 Hill, 520.

¹¹ 5 Wend. 587.

6. Where the holder is ignorant of the endorser's residence, he may send a notice with due diligence to a person acquainted with it, with a request to direct and forward it, and if it is done it will be sufficient.¹

7. If a drawer or endorser be dead, it should be given to his executors or administrators, if they are known; if unknown after due diligence to ascertain them, the notice should be served at his late residence, and where in such case his family has removed into the country, a notice sent to them also, is well.² In case the deceased was one of several joint endorsers, a recovery cannot be had against the survivor, unless the estate of the deceased be so charged.³

8. The question of diligence in giving the notice, when there is no dispute about the facts, is one of law and is wholly for the court. When there is a dispute in relation to the facts they must be determined by the jury.⁴

§ 439. The notice should not be given until after the demand and non-payment. If given before the demand, although the demand be afterward made upon the same day, it is a nullity.⁵

§ 440. In addition to what has been before said, we may add that, regular notice of the dishonor of a bill or note is excused, where it appears that the holder or his agent has used all the diligence which, under the circumstances of the case, he could reasonably be called upon to exercise.⁶ Thus the sudden illness or death of the holder or his agent, or the prevalence of a malignant fever in the place of residence of the parties,⁷ will excuse the regular notice, if it be given as soon as possible after the impediment be removed;⁸ if the notice be served on his return, though if he have had a fixed residence before leaving, a notice should be served there; or ignorance of the place of residence of the party, if after reasonable diligence he is unable to discover it; but in order to show such diligence he should apply to persons whose names are upon the bill or note, or others of the same name who can be found.⁹ Within this class of cases, when the holder, on the day after the bill was dishonored, called at the house of the last endorsers to ascertain where the drawer lived, but did not find them, and the next day called again and ascertained and then gave

¹ 18 John. 240. 1 Hill, 11. 3 Conn. 489.

² 2 Caines, 843. 12 John. 423. Edw.

³ 17 John. 25. 5 Hill, 236. Edw. on Bills, 631.

⁴ 3 Seld. 266. 33 Cal. 176.

⁵ 5 Hill, 232. Edw. on Bills, 630.

⁶ 2 John. Cases 1. 14 Wis. 380.

⁷ Supra. § 435. 2 Sand. 188. 14 Ohio.

⁸ Chit. on Bills, 485. 14 Wis. 380.

N. S. 89. 2 Hill, 587. 3 id. 520. 3 Seld. 266, 274.

⁹ Chit. on Bills, 487.

the drawer notice, it was held he was charged.¹ The loss of the bill or note, a mistake in directing the notice, or the bankruptcy of the party to be notified, is no excuse for want of notice.²

§ 441. It is provided in New York, by statute, that whenever the board of health or any other competent authority, shall by public notice designate any portion or district of the city of New York as being the seat of any infectious or contagious disease, and shall declare communication with such portion dangerous, or shall prohibit it, it shall be the duty of the clerk of the city to keep in his office a book in which to register, in alphabetical order, the names and places of business of any persons and firms in such city, who shall desire such registry to be made; and that all presentment of bills and notes to such persons or firms for acceptance or payment, may then be made at the place designated in the registry, and notices of non-acceptance or non-payment may be served there during the continuance of such disease; and that in case the name of an individual or firm inhabiting the city, to which a bill or note should be presented for acceptance is not so registered, the presentment and demand may be made of the clerk of the city during office hours, and notice of the dishonor thereof be served upon any person or firm to whom it is required to be given, and whose name is not registered, by leaving it in the post-office, directed to the person.³

§ 442. In addition to the cases above mentioned, notice is also excused where the drawer or endorser is the person ultimately liable to pay the bill or note, or where he by his acts prevents it, or substantially or in express terms waives it. As where the bill or note is accepted for the accommodation of the drawer or made for the accommodation of the endorser,⁴ where the maker is insolvent and has assigned all his property to the endorser to secure his and other endorsements,⁵ but the mere taking of security by the endorser is insufficient. Consequently, an assignment to trustees for the purpose of paying debts, or the taking of a judgment, counter bond, lien, personal mortgage, or a power of attorney to confess judgment or similar security does not excuse notice.⁶ The notice is excused,

¹ Gow. 81.

⁵ 7 Wend. 165. 3 Denio, 16. 13 Barb.

² Chit. on Bills, 486, 7 and 8. 12 Wend. 163.

110. 12 How. Pr. R. 166. 14 Wis. 380.
See 6 Ind. 162, Contra.

⁶ 17 Wend. 489. 3 Kern. 55. 2 E. D.
Smith, 159. 4 id. 458, 13 Barb. 163. 14

³ 1 R. S. 769, §§ 12 to 17. 3 id. (Banks' 5th ed.) pp. 68, &c., §§ 12 to 17.

Wis. 380. 32 Ill. 38. See also 5 Hill, 235.
18 Barb. 296. 2 John. Ch. 421. 32 Ill. 11.

⁴ Edw. on Bills, 638. 11 John. 181. 7 Wend. 168.

also, where before the note became due the endorser informed the holder that the maker had absconded, and requested farther time for payment;¹ where the omission to give notice was owing to the interference of the endorser, representing the inability of a suit and asking indulgence,² or gave his bond to pay it within a month after it became payable;³ or when the drawer requested the payee to hold it during an indefinite period.⁴ So a stipulation may be given to waive the demand and notice; but if it be in terms simply to waive the notice, it does not dispense with the necessity of the demand.⁵ But a waiver of "protest;" in a popular sense, includes a waiver of demand as well as of notice of non-payment.⁶ The waiver will be effectual if made in such a manner as to induce the holder to believe that the endorser intends to relieve him from the notice;⁷ but where the endorser, on the day a note matured, promised the holder to pay a part and renew it for the balance, and the holder by mistake omitted the demand of the maker, it was held there was no waiver or excuse.⁸ A waiver may be by parol, and without consideration.⁹ If the bill is drawn in the course of partnership business, one partner may make the waiver.¹⁰ An agreement between the payee and his endorser that the note will not be paid by the makers till fifteen days after maturity, does not excuse demand and notice between the parties, nor does the statement of the endorser of an overdue note "that he had dried fruit with him, and that he would pay the note when he sold it," and "that he felt himself bound for the payment."¹¹ On the other hand, it is held that a promise by the endorser to pay an overdue note operates as a waiver of demand and notice;¹² so where the drawer and acceptor wrote to the holder that the money should be paid before the next term,¹³ or where an accommodation drawer admits that he is liable as surety and that the debt is just.¹⁴

§ 443. This waiver of demand and notice by a promise to pay, may be made after, as well as before the maturity of the bill or note; but to be good, this waiver, if made after the paper was due, must be

¹ 1 John. Ca. 99.

² 17 Wend. 439. 4 E. D. Smith, 458.

³ Chitty on Bills, 485. 5 Barn. & Al. 165.

⁴ 31 N. Y. 644.

⁵ 11 Wend. 629. 42 Barb. 646. Edw. 27. 15 Iowa, 446. *Infra*, §§ 443, 444. on Bills, 483. 23 Ind. 523.

⁶ 1 Coms. 186. 19 Ind. 110.

⁷ 4 Camp. 281.

⁸ 10 Wend. 504. 5 Hill, 403.

⁹ 16 N. H. 410. 23 Ind. 523. 24 Ill. 132.

¹⁰ 21 Mo. 46.

¹¹ 4 Minn. 43. 12 Iowa, 43.

¹² 23 Wend. 379. 26 Ill. 426. 17 N. H.

¹³ 1 Stark. 217.

¹⁴ 13 Ind. 223.

with knowledge of the omission of demand or notice.¹ Such knowledge need not be shown by express proof, but may be inferred from circumstances.² The promise, however, must be unconditional, explicit, and proved by the clearest evidence, whether the waiver is express or implied, and unqualified.³ In case of doubt as to the effect of the language from which the waiver is claimed, it must be submitted to the jury.⁴ When the party is aware of the omission, his ignorance of the law will not prevent the waiver if the other facts are sufficient.⁵

§ 444. Demand and notice, or the waiver thereof, will also sometimes be inferred from circumstances; as where the endorsers of a note paid a part without objecting the want of notice to charge them;⁶ where they wrongfully took possession of the note before it was due, and retained it till after maturity, and did acts showing a primary liability upon it.⁷ But to make a payment a waiver, it must be directly and specifically upon the note, and not as a security for all transactions in the aggregate between the parties.⁸ So the giving of the drawer's note to the holder is a waiver;⁹ but declarations addressed by an endorser to a third party "that the want of the notice would make no difference with him, and that he would do what was right; or that he would rather pay the note than be sued," are not waivers.¹⁰ So it is not a waiver that the endorser says at the time of endorsing, that the maker has no funds and that the notes will not be paid.¹¹

§ 445. Except in cases coming within the principle of those above enumerated, the holder is held to the necessity of demanding payment and giving notice of dishonor to the parties he seeks to charge; and if he fails to do it they are discharged of their liability,¹² although they endorsed for the accommodation of the drawer, maker or acceptor, and whether the drawee had or had not effects of the drawer.¹³

[§ 445*a*.] The rules laid down, *supra*, as to demand for acceptance, or payment, and notices of refusal, apply only to negotiable paper.¹⁴

§ 446. Where a foreign bill of exchange is presented to the drawee

¹ 3 John. 68. 5 id. 248. 8 id. 384. 42

Barb. 646. 12 How. Pr. R. 166. 7 Wis.

161. 11 Iowa, 204. 15 id. 447. 10 Cush.

159. *Supra*, § 442.

² 23 Wend. 379.

³ 8 John. 384. 5 id. 375. Lalor, 122.
12 Iowa, 43.

⁴ 32 Barb. 282. 20 Ill. 557.

⁵ 15 Iowa, 446.

⁶ 1 Taunt. 12. 20 Ill. 557.

⁷ 11 Ind. 323.

⁸ 5 Cal. 283.

⁹ 9 Cal. 236.

¹⁰ 5 Cal. 480. 24 id. 329.

¹¹ 7 Minn. 74.

¹² 9 Mass. 205. 10 id. 52. 12 id. 89.
11 East, 114. 1 Serg. & Rawle, 334.

¹³ 4 Cranch, 141. 7 Mass. 449.

¹⁴ 10 Iowa, 317.

for acceptance, and is dishonored, and is regularly protested by a notary, any one may accept it *for the honor of the drawer or endorsers*. This is called an acceptance *supra protest*. The acceptor, by his acceptance, then becomes liable in the same manner as the drawee who accepts, and in order to charge the parties, the bill must, at its maturity, be presented for payment to the drawee, and in case of non-payment notice must be served as in other cases.¹

§ 447. A bill or note may be endorsed after its maturity, in which case, for the purpose of charging the endorser, it is to be treated as if payable at sight, and must be presented for payment, and in case of its non-payment notice must be given within a reasonable time. A bill accepted after its maturity is payable on demand. In these cases the holder should take measures immediately to obtain its payment and to charge the endorser in case of its dishonor.²

§ 448. When a bill or note has been dishonored and drawer or endorsers are properly charged by the holder, they are all liable to him individually for the amount owing upon it, and the expenses of protesting it, if protested;³ and in New York he may bring his action against acceptor, maker and the other parties or any of them, or may bring an action against each of them if individuals, and as partnerships, against each partnership liable.⁴ He may thus proceed simultaneously to obtain judgment against each of them for the amount due him, but he can recover no costs but disbursements in more than one of the actions, which shall be at his election.⁵ He may then issue executions upon all of his judgments, but can have but one satisfaction of the amount due upon the bill or note, with the costs against each defendant of the judgment against him.⁶

§ 449. Where the holder has collected the bill or note of an endorser, the latter may bring his action against any of the prior parties to the bill or note who may have been charged, or against them all, and proceed in the same manner as the holder, to collect the amount due. If he received the bill or note in a business transaction, he can only, unless there is a special promise, recover the amount owing upon it, notwithstanding he may have paid the costs of a judgment recovered against him by the former holder.⁷ But if he was a mere accommodation endorser for a prior endorser, or for

¹ Chit. on Bills, 374. 3 Wend. 488.

⁴ Code of Procedure, § 120.

² 9 John. 121. 3 Wend. 75, 79. 3 Coms.

⁵ Code of Procedure, § 304.

494. 6 Bosw. 593. 12 Cal. 308. 7 Minn.

⁶ Chit. on Bills, 571.

74.

⁷ 9 John. 131.

⁸ 10 Wend. 116.

the maker, he can recover from him, in addition to the amount due upon it, the amount of the costs paid by him, as money paid out for his use.¹ But the endorser must not incur any unnecessary cost and expense as by putting in a useless and unjust defense; if he does, he cannot recover for them.²

§ 450. At common law if the holder of a bill or note wished to resort for payment to more than one of the parties, except in the case of joint contractors, he was compelled to commence separate actions.³ The Code of Procedure of New York, as we have seen (*ante*, section 448), however, provides that "parties severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action, at the option of the plaintiff."⁴ The same provision was contained in a statute passed in 1832.⁵ It will be seen that it leaves it optional with the plaintiff to pursue the old remedy by separate actions, or the new one by a single action.

§ 451. The acceptor being *prima facie* the debtor of the drawer, the latter may maintain an action against him on the non-payment of the bill, but he may defend by showing that he had no funds of the plaintiff.⁶ No action will lie by the drawer against the drawee on the bill for not accepting, although it would upon his agreement to accept the bill and his failure to do so.⁷ Where the acceptor accepted for the accommodation of the drawer, and has paid the bill, he can recover the amount paid in an action for money advanced at his request, but not upon the bill itself.⁸ But where, to an accommodation bill, a third person subscribed his name as surety, and then the bill was paid by the accommodation acceptor, it was held that he could not recover the money so paid of the third person.⁹

§ 452. It has been seen that promissory notes, in order to be negotiable, must be payable in money. In ordinary business transactions, notes are frequently made payable in specific articles, as "to pay twenty dollars in wood at the market price on the 1st of April next." In these cases, if they are made by a farmer, mechanic, manufacturer, merchant or producer, and do not specify any time or place of payment, the general rule is that the owner of the note must go to the

¹ 3 Barb. 634. 5 id. 399, 413. 15 id. ⁶ 9 B. & C. 241. Edw. on Bills, 315, 318. See 31 Mis. 580. &c. 6 Duer, 583.

² 24 Barb. 546.

⁷ Chit. on Bills, 568.

³ 28 Geo. 529.

⁸ Chit. on Bills, 568. 21 Wend. 502. 4 Hill, 211.

⁴ Code of Procedure, § 120.

⁵ Laws 1832, ch. 276.

⁹ 26 N. Y. 539.

farm, shop, warehouse, store, or similar place, and demand the property specified in the note. And, generally, a man's place of business or his dwelling-house is; in such cases, the place where the demand should be made if the goods are portable.¹ And that demand is necessary.² If the note is payable in ready made clothing, by a dealer in such goods, it should be demanded at his store, and may be demanded in parcels at different times; but the owner has no right to demand a garment which has been made for a customer at a stipulated price, or in goods boxed up for removal,³ nor to make the demand in unreasonably small parcels.⁴ The rule, as above laid down as to the place, is subject to be modified by the circumstances of each case showing that, in that particular instance, a different place was intended.⁵ Where such a note is payable on demand, a specific demand is necessary, which may be made at any place, if not met by an offer to pay at the legal place; if made there, and at a reasonable hour, it is sufficient, although there is no one there to make the payment.⁶ If the note is payable at a particular time, but no place is specified, the residence of the creditor is the place of payment, except where it is payable in manufactured, &c., articles; in which case, as we have seen, the note is payable at the maker's place of business, &c.⁷ But if the note is payable in ponderous articles, at a day certain, the maker ought, if he desires to make a tender, to seek the owner of the note before the same is due, and have a reasonable place named by him for the delivery.⁸ Under the Code of Iowa, § 959, where a note is payable in stock on a day certain, no demand is necessary.⁹ If the note is payable at a particular place, but no time is specified, either party has a reasonable time, under all the circumstances, in which to make the delivery or to demand payment. If the place of payment is other than the promisee's house, the maker, after making the proper delivery, must notify the promisee without delay that the delivery has been made.¹⁰ Whether payable generally, or at a particular place, the articles cannot be tendered when mixed and undistinguishable from others; they must be so separated or distinguished

¹ 5 Cowen, 516. 2 Denio, 145. 20 Wend. 196. 4 id. 377. 18 N. Y. 337. 36 Mo. 310. See as to this general subject 2 Story on Con. §§ 807, &c. Ky. Dec. 166.

² 5 Cowen, 516. 28 Ill. 397. 14 Iowa, 530. 15 Wis. 170. 1 Oregon, 227.

³ 20 Wend. 196. 18 N. Y. 337.

⁴ 18 N. Y. 337.

⁵ 7 Barb. 472.

⁶ 2 Denio, 145.

⁷ 5 Wend. 187. 4 id. 377. See, however, 17 Ind. 137 as to the rule in that State.

⁸ 4 Cowen, 452, 1 Grant's (Pa.) Cases. 204. 36 Mo. 310.

⁹ 4 Green (Iowa), 59.

¹⁰ 9 Barb. 402.

that the payee may know which he is required to take.¹ Where a note was payable "in merchandise out of my store, 44 Maiden Lane, on demand," it was held that the maker had a right to sell from his stock, so as to have an inferior assortment, until the demand was made; and that after he had given a reasonable notice to the holder to select his merchandise at the place named, he might remove his stock to any other reasonably convenient place, where only the holder must thereafter make demand for his payment in merchandise.² Again, where paper is payable out of the maker's mill and warehouse as the payees may order, the holder may demand payment in such articles, the usual manufacture of the mill, or usually kept in the warehouse, as he may elect to receive; and the maker's refusal to pay in any such articles, without offering to pay in other proper ones, or these demanded at some subsequent reasonable time, is a refusal to pay the note.³ If the note is payable at a definite time and place, the maker must be present and tender the articles.⁴ If a timely selection of the articles is to be made by the payee, who makes none, and prior to the time of payment instructs the maker not to send any of the articles until he gives him notice of what he wants, the maker's liability is not discharged; but the holder may, at any time afterward, name the articles, unless in the meantime the maker has made the selection; and if the holder so selects, the maker must pay them in a reasonable time.⁵ A note was made payable partly in lumber, "if delivered according to contract," to be sawed at the promisor's mill, within a fixed time. The mill not being in operation till after that time, held that no demand was necessary before an action for the money.⁶ If payable in "wagon work," that term, unexplained, includes wagons and parts of wagons, and the materials and labor bestowed upon them.⁷ This case also holds that if the payee has the right to designate any particular kind of wagon work, his neglect to do so before the note falls due is a waiver thereof, and the right then devolves upon the maker, who must make his selection and tender in a reasonable time thereafter. On a failure to pay the note, or to tender payment in the manner or at the time or place required by the note, the payee may recover the amount in money.⁸ But if the note is payable, at the maker's option, in specific articles or money, and the

¹ 4 Cowen, 452.² 18 N. Y. 337.³ 15 Ind. 1.⁴ 4 Cowen, 452.⁵ 2 Seld. 535. But see 19 Ind. 24.⁶ 20 Texas, 132.⁷ 19 Ind. 24.⁸ 5 Wend. 393. 4 Hill, 164. 2 Seld. 585. 1 Grant's Cases (Pa.) 204. 33 Ala. 668. 27 Ill. 338. 28 id. 397. 20 Texas, 132. 19 Ind. 24.

maker notifies the holder that he will pay the articles, which are ready, but the holder refuses to receive them, the note does not become a money demand until the holder demands the articles and they are refused.¹ Where a demand is necessary, a refusal by one of several promisors is sufficient.² A declaration of the promisor that he had determined not to pay the note in any manner, it having been demanded in money, is a waiver of a demand of payment in specific articles, and renders him liable to an action for the amount in money.³ The decisions as to the negotiability of this class of notes have not been uniform even in the same state. In New York and Iowa they are not negotiable, even though payable to order at a banking house,⁴ while, in the latter state, it is also held, in a prior decision, that a note payable in property to A or bearer is negotiable.⁵ In Indiana, a note, part of which is payable in a specific article, is treated as negotiable,⁶ as also in Illinois, in regard to one reading thus: "Due W. G. B. four hundred and fifty dollars, to be paid in lumber at one dollar and twenty-five cents."⁷

§ 453. The payee endorser of a note not negotiable, is liable to his endorsee as maker of a new note, or a guaranty may be written over his endorsement.⁸ Under the ancient system of pleading, where the action upon a note not negotiable had to be brought in the name of the payee, the endorsement was regarded as an authority in the assignee to bring the action in his name.⁹

§ 454. (4.) *Of the discharge of parties to a bill or note, and other sureties.* The holder of a bill or note being entitled to payment of it from each of the parties charged, so long as he does no act which shall prejudice the rights of any one of them against any of the others, he may enforce payment from any one of them. But as the acceptor of a bill and the maker of a note are the principal debtors, and the drawer and endorsers stand in some respects as sureties for them,¹⁰ and if called upon to pay are entitled to look to them for their indemnity, it is just that the holder shall do nothing which can suspend, impair, or destroy their rights.¹¹ The case is the same between different endorsers. Each is a surety for all the previous endorsers who have been charged, and has a right, on the dishonor

¹ 3 Iowa, 518.

² 27 Ill. 338.

³ 15 Wis. 170.

⁴ 20 N. Y. 472. 11 Iowa, 172. Id. 85. 9 id. 471.

⁵ 3 Iowa, 334. Also 9 id. 471.

⁶ 15 Ind. 297.

⁷ 27 Ill. 338. Also 28 id. 397.

⁸ 8 Wend. 403. 2 Hill, 84. 40 N. Y. 491, and notes p. 492, &c. 1 Keyes, 576. 10 Barb. 402. 39 id. 42. 2 Cal. 485.

⁹ 16 Mass. 458.

¹⁰ 2 Coms. 352.

¹¹ 18 Iowa, 159.

of the bill or note, to pay it to the holder, and look to those who are liable to him, for his indemnification. If therefore, where there were three endorsors to a bill or note who were charged, the holder should release the maker, he would discharge the note, and thus prevent either of the three endorsors collecting it of the maker, if he should pay it. So, if he released the first and second endorsors, he would put it out of the power of the third endorsor if he should pay the note, to resort to them. In like manner, if, by a valid agreement made with the maker or an endorsor, he should suspend or impair his remedy against them, it would operate to suspend the right of all the subsequent parties to the bill or note to pay it, and proceed immediately to collect it of those persons with whom the agreement was made.¹ The law, therefore, in these cases, provides that when the holder by his own acts does anything to suspend, impair or destroy the rights of any of the later parties to a bill or note, without their consent, against antecedent parties who would be liable over to them, he discharges such later parties.² The question of benefit or harm to the surety is not the test; it is whether there has been a material change made.³

§ 455. A mere indulgence to the maker at the will of the holder, as it does not suspend or impair the remedy of any endorsor against him who chooses to pay the holder the bill or note, does not discharge the endorsor,⁴ nor does the receipt from the maker of a security on time, if taken with an agreement that it shall not prejudice the holder's remedy against maker and endorsor, nor prevent an action against the maker if required by the endorsor,⁵ nor a release of one of several joint makers, excepting from such liability as he may be under to the endorsors.⁶ In these cases, no injury to the rights of the other parties is done. If, however, the holder release the acceptor or maker, or enter into any valid agreement with him to give him time, it will operate as a discharge of all the other parties;⁷ and in like manner, if he discharges the first endorsor, he will discharge all who have subsequently endorsed;⁸ but the releasing a subsequent endorsor will not discharge a prior one, nor releasing an endorsor discharge the drawer or maker.⁹ The rule has been applied where a

¹ 16 John. 70. 18 Iowa, 159.

⁵ 7 Wend. 289.

² 7 Hill, 250. 32 N. Y. R. 691. 31 Barb. 297. 22 Iowa, 152. 31 Mo. 218. 6 Ind. 128. 13 id. 286.

⁶ 2 Caines, 121.

⁴ 4 Coms. 315. 25 N. Y. 479. 23 Barb. 478.

³ 6 Duer, 276.

²¹ Wend. 108. 2 Sand. 189.

¹⁷ Wend. 501. 4 Coms. 446. 10 Cal. 419. 31 Mo. 218.

⁹ Chitty on Bills, 451. 6 Cowen, 484. 7 Paige, 9. 20 N. Y. 138.

release or time was given to the endorser of a note made for his own accommodation, when it was held not to discharge the maker.¹ In order to render an agreement to give time to an acceptor or maker operate as a discharge of subsequent parties, it must be one on a consideration, and without fraud, and which can be legally enforced against the holder, and which would suspend his remedy until the expiration of the time, and a good consideration must necessarily enter into it.² The receipt of a bond or other security payable at a future day, would be a sufficient consideration for the agreement, and operate as a discharge, although the original bill or note should be retained.³ But the receipt of a bond, or judgment, or any other collateral security for the demand, without an agreement to delay the collection of the bill or note, will not discharge the subsequent parties.⁴ The agreement must be a distinct one, and stipulate for a delay for a definite time, or it will not affect the other parties.⁵ A void, usurious contract cannot extend the time, so as to discharge the surety.⁶ Where sureties were given for the performance of a contract, an extension of the time for the first payment discharges the sureties.⁷ If the agreement is made between the creditor and one of two sureties for an extension, this only discharges the other surety from such part of the liability as the first named surety is under to contribute to its payment.⁸ A person who has given security for the payment of another's debt, is a surety, and discharged by a valid extension of that debt.⁹ It makes no difference that the surety does not appear as such on the note, if he was so in fact, and that to the knowledge of the payee or holder.¹⁰

If the holder of a note makes a valid agreement not to bring suit against the estate of a deceased principal, for a time not exceeding that within which such suit is prohibited by law, his surety is not discharged.¹¹ If he makes an agreement with a third person to give

¹ 17 John. 169.

⁶ 13 Ind. 457. 10 id. 227. 16 id.

² 13 John. 87. 9 Cowen, 194. 37 N. Y. 248. 17 id. 202. 11 Ohio N. S. 601. 601. 38 id. 96. 5 Transcript, 320. 18 1 Coms. 274. *Aliter in* Iowa, 13 Iowa, Barb. 166. 3 Ind. 346. 6 id. 461. 17 id. 289, and New York, 29 Barb. 401. 33 202. 26 Ill. 282. 28 id. 481. 35 id. 40. N. Y. R. 31. 16 Wis. 666. 15 Ohio, 57. 38 Mo. 281. 23 Ill. 64. 43 id. 235. 22 Iowa, 178.

¹⁴ Ohio N. S. 372.

³ Chitty on Bills, 451. 6 Duer, 294. 5 Cal. 329. 12 id. 561. 31 Mo. 218.

¹⁶ Iowa, 130.

⁴ Chitty on Bills, 442. 14 Barb. 232. 16 Wis. 666. 21 Wend. 504. 2 Coms. 17 id. 492. 36 id. 294. 44 id. 541. 1 354. 10 Minn. 308. Boaw. 411.

¹¹ 13 Wis. 543.

⁵ 17 Wend. 501.

time on a note, if he, the third person, will endorse it, which agreement is unknown to the maker, and it is so endorsed, this will not discharge the surety or guarantor of the maker.¹

§ 456. The acceptance of a confession of judgment from the maker, with a stay of execution until the time before which he could not by regular process have compelled a judgment, is not an indulgence which discharges an endorser.² And where a judgment is obtained against a drawer or maker, his discharge under an insolvent or bankrupt act will not operate as a discharge to the endorsers, notwithstanding the holder proves his debt and receives a dividend under the proceedings in insolvency or bankruptcy,³ unless he himself be a petitioner for his debtor's discharge, in which case it would discharge subsequent parties.⁴ The receipt of part payment from the maker after the debt is due, or the collection of a portion of the demand upon execution, is not a discharge to subsequent parties.⁵ As to payments of principal or interest, if paid before it is due, it is a sufficient consideration for an agreement to extend the time;⁶ but the payment of that already due is not.⁷ If the holder, at the time a bill or note becomes payable, receives a portion of it, and then gives notice to the endorser of the non-payment of the balance, the endorser will be charged as to the part unpaid.⁸ Where an award upon a submission between a creditor and the principal debtor, extends the time for payment, the sureties of the debtor are discharged.⁹

§ 457. It is a well established rule that a surety upon the payment of a debt, has a right to the benefit of all securities held by the creditor or levies on property, and that if they are surrendered without his consent, he is discharged to the extent of their value.¹⁰ And, on the other hand, the creditor is entitled to the benefit of all collaterals received by the surety, although he did not originally rely upon them, or know of their existence.¹¹ But while this is the general rule, the parties to notes do not so far sustain the relations of principal and surety (although, as we have said, they stand in some respects as such, *ante*, § 454), as to make this rule apply to them. And, therefore, if the

¹ 38 N. Y. 330.

⁷ 17 Ind. 202.

² 18 John. 28. 23 Wend. 81. See 13 Wis. 543.

⁸ 1 John. Ca. 131.

³ Chitty on Bills, 449.

⁹ 2 Sel. 44.

⁴ 16 John. 41.

¹⁰ 3 Com. 446. 28 N. Y. 271. 43 Barb. 461. 32 id. 9. 3 Minn. 217. 15 Ind. 308. 18 id. 74. 17 Iowa, 473. 38 Mo. 281. 46 Ill. 428. 29 Ind. 158. Id.

⁵ 1 John. Ca. 131. 31 Miss. (2 George) 664. 30 N. Y. 574.

⁶ 27 Ill. 323. 26 id. 282. 30 N. Y. 474. 347.

25 Barb. 175. 26 Ind. 338. 17 id. 202.

¹¹ 4 Coms. 312. 43 Barb. 461.

holder of a promissory note taken in the usual course of business, obtains from the maker a collateral security for its payment, the endorser of the note does not stand in such a relation to him as surety for the maker as to entitle him to an account for its value, if the holder has in good faith surrendered the security.¹ If one of several sureties takes security it enures to the benefit of all.²

§ 458. A release in order to discharge subsequent parties, must be made either by the holder or by one who is charged, and between whom and the prior parties there is an existing and fixed obligation. Thus, where on the execution of a voluntary assignment by the makers of a note for the benefit of their creditors, the second endorser of the note executed a general release to them, and was subsequently charged upon his endorsement, it was held that the release having been executed before the maturity of the note, he was not barred by it from maintaining his action upon the note, against either the maker or the first endorser.³

§ 459. By a similar rule, a release between the immediate parties to a note will not discharge it when it is in the hands of a third person; as where the plaintiff made a note for the accommodation of the defendant who negotiated it to A.; the defendant becoming insolvent and owing the plaintiff and A., they, by a writing expressing a consideration, released him from their debts against him, A. not knowing that the note was made for defendant's accommodation. He then collected the note of the plaintiff, who brought his action against the defendant for the money paid upon it. It was held that the release of A. was inoperative upon the note, and that, therefore, the plaintiff might recover against the defendant for the money paid.⁴

§ 460. In the cases above mentioned, where a release or indulgence of any of the parties to a bill or note would discharge all the subsequent parties, if it is done by the assent of the latter it will not affect the right of the holder to his action against them.⁵ And in cases where the drawee or acceptor has no effects of the drawer, and where for that reason, the holder would be excused from giving notice of non-acceptance or non-payment, and also where a bill is accepted or a note given for the accommodation of the drawer or endorser, the holder may give time, take security of or release the

¹ 2 Coms. 352.

² 30 Barb. 408. 6 Minn. 492.

³ 12 Wend. 110.

⁴ 17 John. 169.

⁵ 12 East, 38. 32 N. Y. R. 691 6
Bosw. 600. 26 Ill. 282. 27 id. 333. 23
Iowa, 152.

acceptor or maker without impairing his right against such drawer or endorser, for the latter are not sureties, but principals.¹

[§ 460a.] After a surety has been released by an extension of time, his promise to pay binds him, without any new consideration to support it, if he at the time of making the promise has full knowledge of the facts releasing him.²

§ 461. There is no obligation of active diligence on the part of the holder of a bill or note to bring an action against any of the parties, in order to relieve any of the other parties to it; and he may forbear to do this as long as he chooses, and he may entertain propositions for security.³ It will make no difference although the drawer or endorser should request him to sue the acceptor or maker, and he should refuse to do so, and the latter should become insolvent;⁴ or if after he had obtained a judgment against a prior party a subsequent one should request him to issue an execution, and he should refuse.⁵ In this respect, although the condition of an endorser is in some respects like that of a surety for the prior parties to a bill or note, yet he cannot, like a surety, compel a creditor to enforce his demand against the principal.⁶ A joint maker, who is surety to the other maker, cannot discharge himself by requesting the payee to sue the demand, the real maker being then solvent.⁷

§ 462. In the ordinary case of principal and surety, the latter may, after the debt is payable, call upon the creditor to bring an action upon it, and if he declines to do it, and the principal becomes insolvent, the surety will be discharged.⁸ In other respects than this, and the one mentioned in section 457, the rule as to endorsers, &c., of notes is the same as in the ordinary cases of suretyship, and the decisions relative to the two classes of cases are commingled in the preceding sections under this head. Such being the similarity of the rule, an agreement made between the creditor and the principal for delay, is subject to the same rule as one between the holder and maker of a promissory note. It must be upon good consideration, and capable of being enforced by the principal against the creditor, or it will not affect the surety.⁹ And a delay in enforcing the claim

¹ Chitty on Bills, 450. Edw. on Bills, 575.

² 3 Wheat. 525.

³ 9 Mich. 11. 31 Ill. 400. 22 Iowa, 152.

⁴ 16 John. 152. 8 Wend. 194. 21 id. 503, 504. 5 Barb. 462.

⁵ 17 John. 176. 3 Coms. 446. 14 Barb.

⁶ 24 Cal. 165.

232. 1 Bosw. 411. 15 Ark. 415. 9 Cal.

557. 5 id. 173. Chitty on Bills, 445, 446. 15 Ind. 45. 25 id. 107. 29 id. 347.

⁷ 13 John. 174. 10 Wend. 162. 4 Hill, 650. 25 N. Y. R. 552. See 25 Ind. 107, as to their Code.

⁸ See 9 Cal. 557.

⁹ 2 Hall, 185. 29 Texas, 159.

against the principal, unless where the creditor has been required by the surety to sue, and where the delay has occasioned a loss, will not prejudice the right to enforce the debt against the surety. To relieve the surety, it must appear that he requested the creditor to proceed against the principal at a time when he was solvent, and within the jurisdiction of the state, and that the creditor without reasonable excuse neglected to do so until the principal became insolvent and unable to pay.¹ Neglect to sue a contractor for one breach does not discharge his sureties as to others.² If the suretyship does not appear on the face of the instrument, and the creditor was ignorant of the fact, the surety is not released by the extension of time to the principal.³

§ 463. In the case of *joint and several* notes, the holder may sue one of the makers and collect a part of his debt against him without discharging the other; and the giving time to one, or agreeing not to bring an action against him, will not bar an action against the other.⁴ Nor will a discharge under an insolvent law of two of three joint makers of a note operate as a discharge to the other.⁵ But where V. and H. were indebted upon a joint and several note to G., and he obtained a judgment against V., upon which he was committed to jail upon an execution and gave a bond for the prison liberties, and G. then received from him a part of the debt and discharged the bond, it was held that it was a discharge of the debt against both V. and H.⁶

§ 464. (5.) *When the receipt of a bill or note is a payment for a precedent debt.* In general, one simple contract cannot be extinguished by another of the same character. And, therefore, as a general rule, where a creditor receives from his debtor, his (the debtor's) own bill, check or note on the debt, it operates as payment only so far as to suspend the remedy of the creditor upon the debt till the bill or note is dishonored.⁷ In some of the states, the rule is carried so far that it is not a payment even if expressly agreed to be taken as such.⁸ In others it is a payment if so agreed to be.⁹ Where the note is not a payment, it is an extension of the time of payment;

¹ 8 Wend. 194. 4 Hill, 650. 21 Barb. 249. 45 id. 214.

² 7 Cal. 419.

³ Supra, § 455.

⁴ Chitty on Bills, 449.

⁵ 3 Caines, 4.

⁶ 4 Verm. 531.

⁷ Chitty on Bills, 195. 15 John. 247. 38 Ill. 160. See supra, § 389 a, as to this general question.

⁸ 1 Hill, 516. 5 Barb. 408. 3 Kern. 562. 48 N. Y. R. 331.

⁹ 11 Wis. 334. 19 Ill. 207. 4 Ohio N. S. 60.

but when dishonored, the cause of action revives.¹ The same rule prevails where goods are purchased and paid for in the purchaser's bill or note.² The vendor cannot bring his action for their price so long as the bill or note is not dishonored; but as soon as it is he may, the same as if there had been no bill or note taken; and he need not cancel the note or order to do this, although he should have it ready to deliver up or cancel upon the trial.³ The rule is the same in the case of a bank check which is dishonored;⁴ for although a check be drawn against funds of the drawer, it is not presumed an absolute payment; and in this respect it is subject to the same conditions as other orders for the payment of money at sight which are not paid on presentation.⁵ A note void for usury, cannot amount to a payment of a prior valid indebtedness.⁶

§ 465. A negotiable bill or note of a third person, given upon a pre-existing or cotemporaneous debt, will discharge it, if such was the express agreement between the parties, and there was no fraud.⁷ If given upon a pre-existing debt, the presumption is that it was not taken as a payment;⁸ if for a cotemporaneous one, the presumption is that it was taken in payment;⁹ and the burden of proof varies in each case. So, if the note is not negotiable, the presumption would be that it was not received as payment.¹⁰ The rule has been extended to the case of a note given by one of several partners for a partnership debt, on the ground that the creditor receiving it obtained a possible advantage in case the private debts of the partners should exhaust all their effects, and the partnership prove insolvent, as he would then be able to resort to the private estate of the debtor who gave the note.¹¹ It is held, on the other hand, in Indiana, that the note of one joint debtor is not a discharge of a joint debt;¹² the con-

¹ 5 John. 68. 1 Cowen, 290. 6 Barb. 244. 21 Cal. 386. 8 id. 501.

² 18 Cal. 330. 21 id. 11.

³ 4 Barb. 369. 6 id. 432. 15 id. 81. 32 id. 296. 2 E. D. Smith, 621. 23 Cal. 322. 16 Ill. 161. Id. 513.

⁴ 4 John. 296. 1 Hall, 56. 23 Barb. 478. 29 id. 509. 39 id. 203. 23 How. Pr. R. 399. 11 Mich. 501.

⁵ 6 Hill, 56. 15 John. 224. 21 Cal. 386. 35 Ill. 10.

⁶ 16 Wis. 319. 17 id. 383.

⁷ 1 Cowen, 359. 5 Wend. 85, 490. 3 Kern. 167. 31 N. Y. 113. 53 Barb. 69.

37 How. Pr. R. 534. 8 Cal. 501. 12 id. 317. 3 E. D. Smith, 54. Id. 507. Lalor, 312. 8 Mich. 494. 38 Ill. 160. 17 Iowa, 240. 11 Minn. 198. 30 Ind. 91.

⁸ 3 Kern. 167. 45 Barb. 354. 1 Daly, 91. 6 Minn. 468; but see 38 Ill. 160.

⁹ 11 John. 409. 15 id. 241. 1. Sand. 9. 3 Kern. 167. 34 N. Y. R. 258. 27 Barb. 192. 6 Minn. 468.

¹⁰ 4 Mass. 93. 6 id. 143. 15 John. 224. 5 Denio, 360.

¹¹ 3 Denio, 410. 6 Barb. 211. 27 Ill. 46.

15 Ohio, N. S. 169.

¹² 11 Ind. 22.

trary rule prevails in New York and other states.¹ If, where the presumption is against it, it be not shown that it was received as an absolute payment, it will be regarded as a conditional payment only, and be governed by the rules laid down in the preceding section.² The question is one for the jury,³ and the fact that the creditor gave a receipt for the note of a third person "as cash,"⁴ or "in payment of account,"⁵ or, on receiving a check of a third person, surrendered to the debtor his note,⁶ is not sufficient to establish an agreement to receive them as an absolute payment. But where a creditor was directed by his debtor to apply to a person who owed him for the amount of his debt, and the creditor received from such person a check upon time in lieu of money, it was held that it discharged the debtor.⁷ An agreement made between the payee and maker of a note, with the assent of the latter's partner, to apply the former's indebtedness to the partnership in payment of the note, operates immediately, as a satisfaction of the note to the amount of that indebtedness.⁸ The acceptance by the creditor of the note of a surety is payment of the debt owed by the principal.⁹

§ 466. As we have seen, *ante*, § 465, the receipt of the note of a third person, for a cotemporaneous debt, is presumed to be as payment. This is so whether it is endorsed or not by the debtor.¹⁰ If, however, the purchaser guaranty a note given for the price, the guaranty although void for not expressing the consideration, or because it is by parol, is evidence that the note was not received in payment.¹¹

§ 467. If forged bills or notes, or counterfeit bank bills, are received in payment upon the sale of property or upon a debt, though both parties supposed them to be genuine, the payment is a nullity, unless the person receiving them expressly took upon himself the risk of forgery.¹² In such a case, the one receiving them should, within a reasonable time afterwards, and immediately upon discovering the forgery and before bringing his action, return or

¹ 7 John. 311. 23 How. Pr. R. 98. 17 Iowa, 240. 27 Ill. 46; but see 1 Cowen, 290. 7 John. 311.

² 4 Coms. 312. 1 Daly, 91. 26 Conn. 487. 18 Cal. 330.

³ 9 John. 310. 32 Penn. 493.

⁴ 5 John. 68.

⁵ 10 Md. 27.

⁶ 5 Wend. 490.

⁷ 1 Sand. 81

⁸ 24 N. Y. 386.

⁹ 37 N. Y. 299, and refs.

¹⁰ 3 E. D. Smith, 507. 1 Sand. 9. 11 John. 409. 15 id. 241. 3 Cowen, 272. See 6 Minn. 468.

¹¹ 5 Denio, 360. 11 Barb. 485. *Aliter*, 21 Wis. 432.

¹² 5 Taunt. 488. 2 John. 455. 6 Hill, 340. 2 Hilton, 397. 50 Barb. 112.

offer to return the bill or note.¹ If the bill or note is worthless on account of the insolvency of the maker, it is nevertheless a payment, in the absence of fraud or warranty.² The rule is different in regard to bank bills, which are not payment if the bank is insolvent, though that fact was unknown to the parties at the time.³ The rule in regard to their return is the same as in the case of forged bills or paper, except that if the person from whom they were received cannot be ascertained till the trial, it is sufficient to return them then.⁴ If the debt is paid in bank bills which have been declared illegal, but which were paid the debtor at his request, or he has since passed at par, the debtor afterward redeeming them, so that the creditor has suffered no loss in either case, the payment is a good one.⁵

§ 468. In all cases where a bill or note is given in payment of a previous debt or upon a purchase, if it be forged, or there be fraud in transferring it, the person receiving it may treat it as a nullity and resort to the original debt or contract of sale, and may bring his action at once, although the bill or note was payable at a future day.⁶ He may also do this, if the bill or note were received upon any condition which the person transferring it has neglected to keep.⁷

§ 469. When a bill or note is received conditionally, in either of the cases above mentioned it will become an absolute payment, if the holder receives in place of it, from the acceptor or maker, a new note payable at a future day.⁸ The same effect will be produced if he negotiates the bill or note, unless he again obtains it before bringing his action upon the original indebtedness or contract.⁹ If, therefore, he brings his action, in any of the cases where he may, upon the original indebtedness or contract, whether before or after the maturity of the bill or note, he must, if required, either produce it on the trial, or show it to be lost.¹⁰ If a creditor receives from his debtor the business note of a third person, on the agreement that it shall be full payment of a larger debt, if paid at maturity, but not otherwise, and it is not paid then, but the holder receives payment

¹ 6 Hill, 340. 50 Barb. 112. 51 id. 105. ⁶ Chitty on Bills, 196. 6 John. 110. 7 Wis. 185. 11 Ill. 137. 45 id. 376. 15 id. 475. 21 Ind. 411.

² 3 E. D. Smith, 54. Id. 175. ⁷ 2 Camp. 329.

³ 11 Wend. 9. 13 id. 101. 6 Hill, 340. ⁴ 4 Dall. 155. 9 Wend. 122. 10 Iowa, 7 Wis. 185. 10 Ohio N. S. 188. 7 Wis. 437. ⁵ 3 Cranch, 318. 15 John. 247. 35 Ala. 185. Aliter in Tenn. 2 Head. 609. ⁸ 3 Barn. & C. 373. 7 Wis. 185. 6 Hill, 698.

⁹ 6 Barn. & C. 373. 7 Wis. 185. 6 Hill, 340. ¹⁰ 15 John. 247.

¹¹ 18 Ind. 52. 19 id. 301.

of the note afterward, that is a waiver of the condition, and the original debt is discharged.¹

§ 470. Where a purchaser transfers to the vendor a bill or note *with his endorsement*, or a debtor in like manner transfers one to his creditor under circumstances which render it only a conditional payment, the payment will become absolute by the neglect of the holder to exercise the same diligence in presenting the bill or note for payment, and in case it is unpaid, of giving notice to the person transferring it, as is required to charge a drawer or endorser in other cases.² This neglect is technically termed *laches*, and if it be such as in an action against the drawer or endorser would prevent a recovery, it will operate not only to discharge the person transferring the bill or note as one of the parties to it, but will actually extinguish the debt it was given to apply upon.³ The principle of the rule is that a debtor who draws or endorses the bill, or who endorses the note, has a right, in the event that it is dishonored, to pay it and instantly resort to the acceptor or maker, and that if the creditor by his laches deprives him of this right even for an instant, he discharges him from all liability to him,⁴ and that by retaining the bill or note and omitting to notify the original holder, he has given the acceptor or maker an implied credit, and thus prevented him from paying it up and bringing his action upon it.⁵ In England the rule in relation to laches applies whether the bill or note transferred conditionally was or was not endorsed by the party transferring it.⁶ It is, however, confined in New York to the case where the bill or note was transferred by endorsement.⁷

§ 471. An illustration of the rule contained in the last section is found in the case of *Bridges v. Berry*.⁸ The defendant was indebted to the plaintiff as acceptor of a bill. He gave him as a security, a bill drawn by himself upon a third person. At its maturity it was not paid, but the plaintiff omitted to give the defendant notice of the non-payment. He then brought his action upon both bills. The defendant insisted that he was not liable upon the second bill because not charged, and that the omission to charge him on that operated to render it an absolute payment of the original debt as a security for

¹ 6 Sel. 440.

² Chitty on Bills, 197.

³ 23 Wend. 345. 6 id. 658. 21 Cal. 386.
11 Mich. 501.

⁴ 3 Taunt. 130.

⁵ Esp. Dig. part 1, 133. 1 Burr. 352.

2 Wils. 353. 3 John. 230. 1 Str. 550.

4 Dall. 155.

⁶ 2 Barn. & Ald. 501.

⁷ 1 Wend. 219.

⁸ 3 Taunt. 130.

which it was given. The court sustained the position, remarking "The defendant delivered a bill to the plaintiff as security upon which he (the defendant) had a right to sue other persons. The plaintiff by not giving him notice of non-payment had put it out of his power to recover what was due thereupon, and having so done, he shall not be permitted to resort to the first bill."

§ 472. The holder of a foreign bill received conditionally upon a purchase or a pre-existing debt, may be held to have elected to consider it as payment, if upon its dishonor he has it protested and renders an account to the person transferring it, in which he charges him the damages allowed on the protest of such bills.¹ If, however, he returns the bill and requests a remittance on the original debt, he simply waives the bill and retains his debt.²

§ 473. Where an agent buys goods for his principal and gives his own notes for the price, they are, so far as the question of payment is concerned, regarded in the same manner as the notes of his principal;³ and the rule is the same where the agent gives his note in payment of the principal's debt without any express agreement that it shall be received in full discharge thereof, and where it appears that the principal, upon the strength of the payment, has allowed to the agent the amount.⁴

§ 474. Where a creditor has a lien upon any property for his debt, the receiving a bill or note in satisfaction will in general determine it. Thus the receipt of a promissory note for labor bestowed upon an article by a mechanic, has been held to indicate an intention to waive his lien and rely upon the security given him, and this whether the note were payable presently or at a future day.⁵

§ 475. The following cases illustrate the rules in relation to the transfer of bills or notes as payment of the price of an article purchased, or an existing debt. Where a defendant on the purchase of goods gave the plaintiff an order upon a third person who accepted it, payable on the return of the defendant's brig, and the plaintiff gave a receipt in full, the vessel never having been heard from, the court held that unless the defendant could show that the plaintiff was to take the risk of the voyage, his action was maintainable.⁶ Where a mortgage was given to secure a note, and the mortgagee took a new note from the mortgagor and delivered him the old one, it was held

¹ 2 Dall. 100.

² Id. 134.

³ 1 Cowen, 359. 3 Bosw. 497.

⁴ 1 Cowen, 359. 3 Coms. 168. 7 Abbott, 259.

⁵ 4 Verm. 549. 23 Ill. 374.

⁶ 11 Mass. 143.

that the mortgage was not affected.¹ Where a sheriff without the plaintiff's leave, received a promissory note in satisfaction of an execution and discharged the defendant, it was held a nullity against the plaintiff's judgment, and that he might issue a new execution upon it.² So where in such a case the attorney for the plaintiff received the note from the sheriff, without a special agreement that it should be received in payment, it did not discharge the judgment.³ Where one gave his note in payment upon a subscription, he was not precluded from defending an action upon it by showing a defense to the subscription.⁴ A note of a third person received upon an express agreement that it should be a payment of a judgment extinguishes it.⁵ A horse was sold on the purchaser's agreement to give the vendor a good and collectible note of some third person, responsible for the same, for the sum of \$200. One was sent accordingly, made by a stranger, to the vendor, who took it and laid it away, remarking that he did not know the man. When it became due, the maker was insolvent. It was held that the note was taken not as an absolute, but a conditional payment, and being worthless when due, the vendor could recover the price of the purchaser.⁶

§ 476. Wherever one has, upon a settlement of an account, given his note for the amount, and the creditor brings his action upon the original contract, an answer simply alleging the giving of the note would be an insufficient defense. If the note was upon time, and was not payable, that should be set forth in the answer, and it would show that the remedy upon the original cause was suspended. But if the note had become payable, the plaintiff might at the trial produce and cancel it.⁷

§ 477. (6.) *When a bill or note is evidence of money received for the plaintiff's use, or lent to or paid for the maker.* Under the ancient system of pleading it was usual, in setting forth the plaintiff's cause of action upon a simple contract, as for the price of goods sold, labor furnished, money lent to defendant, or received by him for the plaintiff's use, to state in one or more *counts* in the *declaration* the facts out of which the cause of action arose, with an allegation that the defendant in consideration thereof promised to pay the plaintiff the amount owing when he should be thereto afterward requested ;

¹ 8 Pick. 522. 2 N. H. 525.

² 6 Cowen, 465. It was also uncollectible by the sheriff, in case he should pay the plaintiff, as contrary to the policy of the law.

³ 2 N. H. 376.

⁴ 1 Verm. 212.

⁵ 5 Wend. 85.

⁶ 27 Barb. 192.

⁷ 8 Cowen, 77. 15 John. 247.

and then to add another set of counts, which were called *common counts*, in which the plaintiff alleged that the defendant was indebted to him for work and labor, goods sold him, money lent to him, money paid for his use, money by defendant received for plaintiff's use and not paid over. If the action was brought upon a bill or note, one set of *counts* would set forth with legal formality that the defendant accepted, drew or endorsed the bill, or made or endorsed the note, and that it was negotiated to the plaintiff, whereupon the defendant promised to pay the amount payable thereon to the plaintiff, and the common counts for money lent, money paid, and money received were then added. These were called money counts, and a negotiable bill or note was of itself evidence between the holder and any of the parties liable upon it, to sustain any of the money counts.¹ In like manner a note not negotiable, if it expressed "for value received," upon proving a consideration, was evidence under these counts. The system of pleading in New York provided by the Code of Procedure has superseded the use of the *common counts*, by requiring that the complaint shall state in a plain and direct manner the facts constituting the cause of action.² The rule of evidence, however, is supposed to remain unaffected; and where the complaint alleges the loan of money to defendant, a payment of money for his use, or the receipt of money by him to the plaintiff's use, the production of a bill or note upon which the defendant is liable would doubtless be evidence of the fact to sustain the action. It will, however, be better, in a justice's court, for a plaintiff who has commenced an action upon a bill or note, simply to state in his complaint that he is the owner and holder of a note made by the defendant, of which he gives a copy, and that the defendant is indebted to him upon it in the amount owing. This it is supposed will be a compliance with the rule for pleading in justices' courts referred to. If, however, the note was given for money loaned to or paid for the defendant, or for money received to his use, the complaint may state the fact and the note would be evidence to sustain the allegation. In such a case if the note were lost, it would be necessary to prove the giving of the note, its contents and its loss.

§ 478. X. UPON AN ACCOUNT STATED OR A BALANCE DUE UPON SETTLEMENT. Where two parties have dealings together of any kind, and they reckon together and agree upon the balance due, the law implies a promise from the party owing the balance, to pay it to the other. The fact necessary to be stated in the complaint, and which

¹ 3 Term, 174. 3 Bur. 1516. 3 John. Ca. 5. ² 4 Esp. 159. 2 Car. & Payne, 20.

constitutes the right to relief is, that the plaintiff and defendant accounted together of their mutual demands, or of the demands of the plaintiff against the defendant, and upon the accounting, there was found due to the plaintiff from the defendant, the amount claimed.¹ It is not necessary to show what the accounts were nor how the balance was arrived at.² It is sufficient to show the admission by the defendant that he had agreed to pay the plaintiff a certain sum for articles which he had formerly purchased. In one case where the plaintiff had agreed to sell the defendant a field of turnips, and after the defendant had removed a part he said to him, "You owe me £3," and the defendant replied, "I will pay you before I remove the rest of the turnips," it was held that there had been an accounting and balance found due the plaintiff.³

§ 479. The accounting may be one between partners, and in this case, if a balance be found, and it is not too large, it may be recovered in a justice's court.⁴ It may also be presumed from the receipt of an account rendered by one dealer to another who retains it for a long time without objecting to it,⁵ though he would then be permitted to show a fraud, or gross error, or mistake in it.⁶ The burden of proving the fraud, error or mistake is upon the party alleging it,⁷ who cannot open the account "on suggestions supported by doubtful or by only probable testimony."⁸ If fraud is proved, that will be sufficient to open the whole account; if mistakes or errors only are shown, the party will be permitted to surcharge and falsify it, the former of which is to supply credits, and the latter attacks debits as erroneous; these leave the account in full force as a stated account, except so far as the particular errors are concerned.⁹ But if there has been too long delay, *e. g.*, sixteen years, the account will not be opened generally even for fraud, but only as to those charged in the bill, and satisfactorily proved.¹⁰ The account when stated is not conclusive as an estoppel; it is a mere admission that it is correct.¹¹ The settling the account and ascertaining the balance is in the

¹ 4 Barn. & Cress. 235, 242. 6 Dowl. & 23 id. 184. 13 Cal. 427. 1. Wash. Ryl. 306. 1 Term, 42. 8 Taunt. 688. 4 T. 66.

Iowa, 219. 9 Cal. 353.

² 1 Kern. 170. 4 Sand. 311.

³ 3 Car. & Payne, 236.

⁴ 2 Comyn on Cont. 205. 1 Hall, 180. 2 Bing. 170. 23 Barb. 184.

⁵ 1 Kern. 170. 30 N. Y. R. 197. 31 id. 493. 4 Sand. 311. 45 Barb. 490.

⁶ 18 N. Y. R. 285. 11 Texas, 230. 4 Wis. 219. Ky Decis. 320.

⁷ 1 Kern. 170. 45 Barb. 490.

⁸ 4 Cranch, 306. 4 Sand. 311.

⁹ 2 Barb. 586. 9 Cal. 353.

¹⁰ 4 Sand. 311.

¹¹ 18 N. Y. R. 285.

nature of a new contract to pay it.¹ A claim which is absolutely void by reason of an illegality or immorality in the consideration, cannot be made valid and collectible by being stated as an account.² And yet, where an account is rendered which contains a usurious item, and all of it becomes a stated account, a third person to whom the debtor assigns his demands against the party rendering the account, takes them subject to the right of that party to insist on the whole as a stated account.³ What amounts to a settlement is a question of law when the facts are disclosed.⁴ Where a witness testified that the plaintiff met the defendant and asked him to give him his bond for £126, to which the defendant replied that in a few weeks he expected money, when he would see the plaintiff and settle the account with him and pay it; that he believed the plaintiff at the time showed the defendant an account, but he was not certain of it, but that the defendant did not examine it nor object to it, it was held that in the absence of other evidence, this showed an accounting and promise to pay the balance.⁵ It is competent for either party to show that it was understood that the account should not be considered as stated, or that he did not understand that it was such.⁶

II. OF ACTIONS FOR DAMAGES FOR AN INJURY TO THE PERSON, TO REAL PROPERTY, AND FOR TAKING, DETAINING, OR INJURING PERSONAL PROPERTY, COGNIZABLE IN JUSTICES' COURTS.

§ 480. Under the ancient system of pleading, the cases which are comprehended under this classification found their remedies in actions of trespass, trespass on the case, detinue and replevin. Where the injury to one's person or property was a *direct* one, the appropriate action was trespass; where it was *in consequence* of the defendant's wrongful or negligent act, it was trespass on the case; where it was for unlawfully taking one's personal property, it was an action on the case called trover, or if the plaintiff wished to recover the property, replevin; and where for unlawfully detaining property, detinue or replevin. There were a great variety of rules of pleading and evidence peculiar to the different actions. With the abolition of the forms of action, as has been done by the codes, in many of the states, most of these are superseded in those localities, and in such, all the remedies furnished by each of the ancient forms are now to be obtained by the "civil action," or such other term as

¹ 1 John. 34. 4 Mich. 387.

² 13 J. Scott N. S. 677.

³ 30 N. Y. R. 197.

⁴ 1 Kern. 170. 3 Car. & Payne, 55.

Mood. & Malk. 116. 4 Mich. 336. 10 Iowa, 248.

⁵ 5 Munf. 25.

⁶ 18 N. Y. R. 285.

may be used in the respective codes. In considering the injuries treated of in this division, the subdivisions indicated in their enumeration will be followed.

I. Actions for injuries to the person.

II. Actions for injuries to real property.

III. Actions for taking, detaining, or injuring personal property; and as many of the causes of action arising under each of these divisions arise from the acts of persons acting under color of law or of legal process, in a further subdivision,

IV. The rights and liabilities of persons acting under color of law or legal process will be examined.

§ 481. I. ACTIONS FOR INJURIES TO THE PERSON. The exclusion from a justice's jurisdiction, in New York, of actions for assault and battery, false imprisonment, libel, slander, malicious prosecution and seduction, by the Code of Procedure,¹ extends to all cases of willful, direct injury to the person, and limits it to cases where the injury is a consequence of some wrongful or negligent act. Such act or negligence may be committed either by a defendant or his servant or agent. The general rule is, that where any one either personally or by his servant does an illegal or wrong act, or a lawful one in such a negligent manner that it is likely to produce an injury to others, he is answerable to every person who is in consequence of it injured, although he did not intend to do the particular injury which followed;² within this rule, exploding fire-crackers in the public streets or highways is wrong and unlawful, and if any injury to person or property arises therefrom, the wrongdoer, even if an infant, is liable for the damages.³ A corporation is liable for the torts of its agents, in the same manner as individuals.⁴ A late case holds that it should appear that they were expressly authorized by the corporation, or were done *bona fide* in pursuance of a general authority to act for the corporation on the subject in relation to which they were performed.⁵

§ 482. As a general rule, if the plaintiff, by his own negligence contributed at all to the injury, he cannot recover.⁶ But he is only

¹ Code, § 54.

² 1 Str. 634. 14 John. 432. 4 Denio, 430. 32 id. 597. 34 id. 9. 35 id. 9. 39 464. 2 Seld. 397. 31 Barb. 385. 32 id. id. 61. 40 id. 34. 8 Ohio N. S. 570. 7 480. 40 id. 187. 33 N. Y. R. 369. 16 Wis. 527. 9 id. 202. 23 id. 245. Id. 376. Ill. 313. 5 Blackf. 149. 6 Ind. 248. 18 Cal. 351. 25 Ind. 185. 10 id. 400. 15

³ 29 Barb. 218.

⁴ 36 Mo. 546.

⁵ 40 N. Y. 442.

⁶ 21 Wend. 188. 6 Hill, 592. 24 N. Y. 480. 32 id. 597. 34 id. 9. 35 id. 9. 39 id. 61. 40 id. 34. 8 Ohio N. S. 570. 7 Wis. 527. 9 id. 202. 23 id. 245. Id. 376. 18 Cal. 351. 25 Ind. 185. 10 id. 400. 15 id. 487. 19 id. 40. 29 id. 82. 20 Iowa, 338. 21 id. 15. 24 id. 515. 13 Minn. 30. 40 Mo. 131.

required to have ordinary capacity, and to exercise ordinary and reasonable care, under the circumstances of each case, and if he does not he is remediless. If he does he can recover.¹ Although the plaintiff was guilty of negligence, yet if that had nothing to do with causing the injury, he will succeed in the action.² And so, if the plaintiff is free from negligence, the defendant is liable, though the negligence of a third person contributed to the injury.³ It is said in Indiana that if the injury "happens by the proximate wrong of another he shall be liable for it, even though the remote negligence of the injured party may have contributed to it;"⁴ that if the plaintiff is in fault, but the defendant was aware of the danger in time to prevent the injury by reasonable diligence and did not, that neglect is the proximate and immediate cause of the injury, and makes the defendant liable.⁵ A similar rule exists in Wisconsin and Missouri.⁶ In Illinois it is said that each party must employ all reasonable means to avoid the injury; that if the plaintiff's negligence was slight while that of the defendant's was gross, the latter is liable.⁷ It is further said, in Indiana, that if there was negligence on the part of the plaintiff he cannot recover, unless the defendant's negligence was so gross as to imply a disregard of consequences or a willingness to inflict the injury.⁸

The rule is the same if the plaintiff was in the wrong in any other respect, as when he was on the engine, or the platform of a car, or in a baggage car where the rules forbade him to ride, or on the fender of a sleigh;⁹ but if he was on the platform, attempting to escape from an inevitable collision, or because the car was full and no seat was provided for him, or when acting temporarily as brakeman, he would not be so far in the wrong as to prevent a recovery.¹⁰ The action may be maintained where an injury was received by being run against by the defendant in the highway in a dark night, even if the defendant was no otherwise blameable than by driving on the wrong side of the road.¹¹ But where a child of such tender age

¹ 35 N. Y. 9. 36 id. 39. 6 Ohio N. S. Id. 469. 46 id. 74. Aliter in Wisconsin. 105. 2 Oregon, 200. 15 Ind. 487. 10 32 Wis. 245.

Mich. 193.

² 30 N. Y. 208.

³ 38 N. Y. 260.

⁴ 9 Ind. 399. See also 13 Minn. 30.

⁵ 17 Ind. 102; also 22 id. 376.

⁶ 9 Wis. 202. 43 Mo. 383, and refs.

⁷ 26 Ill. 255; also 20 id. 478, where earlier cases are reviewed. 45 id. 444.

⁸ 25 Ind. 185. 26 id. 76. Id. 370. Id. 459. 30 id. 261.

⁹ 5 Denio, 255. 4 Coms. 359. 22 Barb. 91, 574. 31 id. 419. 32 id. 657. 2 Bosw. 132. 26 Conn. 591. 36 Mo. 418.

¹⁰ 31 N. Y. 314. 34 id. 670. 36 id. 39. Id. 136. 32 Barb. 657. 11 Wis. 238.

¹¹ 5 Term, 648. 3 East, 593. 10 Bing. 112.

as not to possess sufficient discretion to avoid danger was permitted to run in the highway without an attendant, and was there run over by the carriage of a traveler and injured, an action was held not to lie by him against the traveler without showing that the injury was voluntary or willful. The child was negligent, and although incapable of knowing how to avoid the danger, was held bound by the same rule as an adult, if he exposed himself to it.¹ But in a subsequent case it is said that if the child "exercises the caution of one of its years, that is all that can be expected of it."² A sick or aged person, a delicate woman, a lame man, or a child, is entitled to more attention and care from a railroad company than one in good health and under no disability.³

§ 483. Injuries for which damages may be recovered, may happen from accidents arising from a very slight degree of negligence, as well as from those where there has been a gross disregard of the rights of others; as the injury from being run against in the highway in the night, occasioned by the defendant's driving on the wrong side of the road;⁴ where the defendant drove a high spirited horse which he could not control and it ran against the plaintiff; or where the injury was occasioned by carelessly pulling the wrong rein in driving; or by fastening his horse by an insufficient halter, which he broke;⁵ or the unskillfully building a wall which fell and injured the plaintiff; or the digging a pit in the highway into which the plaintiff fell.

§ 484. If the injury happen from unavoidable accident, neither party is responsible for it.⁶ It is therefore necessary as a general rule for the plaintiff to show that there was negligence on the part of the defendant, and none on his own, the burden being on him.⁷ But the very same evidence which proves the occurrence and the injury in connection with the ordinary habits, conduct and motive of men, is frequently sufficient to prove the negligence or to raise a presumption thereof.⁸ Ordinarily the question is one for a jury.⁹ The case may, however, be so clear upon the one side or the other as to make it, as in other cases, a question of law for the court to decide.¹⁰ As an

¹ 21 Wend. 615. See also 6 Hill, 592. 29 Barb. 234. 36 id. 230.

² 1 Daly, 89. See also 26 Ill. 255. 38 N. Y. 455.

³ 36 N. Y. 42.

⁴ 14 John. 432.

⁵ 1 Bing. 213. 41 Barb. 375.

⁶ 1 Bing. 213. Lator, 193.

⁷ 2 Kern. 236. 18 N. Y. R. 248. 34 id.

9. 32 Barb. 144. 41 id. 375. 16 Ill. 300, 558. 18 id. 349. 7 Wis. 425, 527. (But see 13 Cal., 599.) 23 Cal. 268. Ante, § 482.

⁸ 2 Kern. 236. 18 N. Y. 534. 20 id. 65. See 22 Barb. 574. 34 Barb. 256. 40 id. 193.

⁹ 20 Barb. 282. 31 id. 385.

17 Wis. 487. 30 How. Pr.

¹⁰ 29 N. Y. 326. 32 B.

instance of this, we may cite the case of an ejection of a passenger from a car while in motion, and this although he is liable to an ejection in a proper manner.¹

§ 485. The injuries may arise, as was said in section 481, from the negligence of one's servants or agents engaged in the transaction of his business. In this case the action may be brought against the principal and his agent, or the master and his servant jointly.² It has been said to be otherwise, however, if the injury were occasioned by the agent's or servant's willful act, excepting in the case of injuries to passengers in a carriage kept by a common carrier of passengers. In the latter case the owner of the carriage is responsible for the wrongful acts of his servants by which his passengers may suffer.³ This is also the statutory rule in New York for carriages on any turnpike or highway.⁴ But even aside from that, more recent decisions in that state and elsewhere hold that the principal or master is liable for the agent's or servant's willful act, when that act, though willful (and also when against the master's express directions, as some cases hold, though others hold the contrary), was within his employment and authority, and necessary in connection therewith.⁵ If the negligence is caused by the servant's intoxication the master is still liable.⁶

§ 486. In illustration of the rule that one is liable for injuries sustained by the negligence of his servant, if a servant in the course of his master's business negligently drive his cart against the carriage of another person, by which he is injured, or if he obstructs the highway by which a traveler sustains an injury, the master is liable; thus in an action against the master for an injury occasioned by the obstruction of a highway by a pile of wood, laid there by his servant, where it appeared that the master had been accustomed to lay his wood there for several years, and that the servant, while he was sick and without his knowledge, had placed it there, it was held that this was an act in the course of his business as a servant, and the action was sustained.⁷ In such a case, if the wood pile had been placed on the defendant's land, within the road fences, but not within the true lines of the highway, the act would have been excused. The owner

¹ 23 N. Y. 343.

⁴ 1 R. S. 696, § 6. 2 id. (Banks' 5th ed.)

² 1 Cowen, 109. 6 id. 189. 19 Wend. 966.

343. 4 Duer, 473. 22 N. Y. 355. 18 Ill. 488. 43 Mo. 377.

³ 2 Coms. 479. 17 N. Y. 362. 30 How. Pr. R. 315. 28 Ill. 434. 33 id. 121. 26

⁵ 19 Wend. 343. 30 How. 315. 5 Bosw. Ind. 70. 12 Iowa, 348. 19 id. 26.

576.

⁶ 33 N. Y. 369.

⁷ 2 Str. 1083. 6 Cowen, 189.

need not fence up to the boundary of the highway; and if he does not, he may place an obstruction without his fences and out of the road, without being liable to another for an injury in consequence of it. But where the relation of principal or master, and agent or servant does not legally exist, as in general it does not, where the work is done under a contract, and the injury occurs from the act or negligence of the servant of the contractor, the contractor only, and not the party contracting with him, is responsible.¹ To this general rule there are, however, some exceptions, as where the work or erection is itself a *nuisance*, or where the injury was itself a necessary result of the contract.²

§ 487. In a case where the owner of a carriage hired of a stable keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligence an injury was done to the plaintiff, the court held by a divided vote that the owner of the carriage was not liable.³ This was on the principle that the driver was not the servant at the time being of the owner of the carriage.

§ 488. The liability for injuries arising from the negligence of servants and agents, extends to the acts of subordinate persons employed by the agents for a party in any of his business which requires their services, or makes it necessary or proper that they should be employed.⁴ Thus, where one employs another to build a chimney, who employs A to assist him, and A lays lime in the highway, by which a carriage is overturned and an injury ensues, the employer is liable.⁵ So, where the owner of a farm employs an agent to work it for him, and he employs servants who are paid from the funds of the principal, the principal and not the agent is responsible for any injury sustained by their negligence or want of skill.⁶ In these and similar cases there is an implied authority in the agent to employ the subordinate agents, and he is not responsible for their negligence.⁷

§ 489. Wherever a master becomes liable for an injury sustained in consequence of his servant's negligence, he can maintain an action

¹ 1 Seld. 48. 4 id. 222. 1 Kern. 432. 17 Duer, 362. 8 Ind. 127. (See 6 Mees. & N. Y. R. 104. 29 id. 591. 36 Barb. 288. 4 W. 499.)
Bosw. 140. 5 Ohio N. S. 38. 25 Ill. 424. ⁴ 22 N. Y. R. 355. 29 Barb. 419. 40

² 2 Seld. 436. 3 id. 497. 2 Denio, 442. id. 380.
5 Duer, 495. 28 Barb. 198. 8 Ohio N. S. ⁵ 1 Bos. & Pul. 404.
358. 3 Min. 297. 25 Ill. 424. 2 Black. U. ⁶ 5 Barn. & C. 554.
S. 418. ⁷ 6 Term R. 411.

³ 5 Barn. & Cress. 547. 1 Seld. 54. 3

over against him for the damages he is compelled to pay in consequence of it.¹ And, it is scarcely necessary to say that, the master is not liable for any injury to his servant while in his employ when it was occasioned by the servant's own negligence.²

[§ 489 *a.*] A master is not in general responsible to those in his employ for injuries resulting from the negligence, carelessness or misconduct of a fellow servant, engaged in the same general business,³ and this although the grades of the two servants are different, or they are not at the time engaged in the same operation or particular work, if they are in the employment of the same master, and both employed and engaged in the same common enterprise, and to perform duties and services tending to accomplish the same general purposes.⁴ But the master is liable to his servant for any injury happening to him from his (the master's) misconduct or personal negligence; and, therefore, if the master knowingly employs unfit and incompetent servants and agents, or improper and unsafe machinery, or if he was ignorant of the same through his own negligence and want of proper care, and the injury results from these causes, the servant or agent may maintain his action,⁵ unless he had the same knowledge as his employer, or the same means of knowledge of this unfitness and incompetency, or these other defects from which the injury has arisen.⁶ That the servant is a minor, makes no difference in the rule.⁷ If the servant injured is connected with one department or branch of service, wholly unconnected with that with which the one committing the injury is connected, although the same person or company is the employer, the injured servant may recover against the employer.⁸

§ 490. In New York it is provided by statute that whenever any persons traveling with carriages shall meet upon a public road, they shall seasonably turn their carriages to the right of the center of the road, so as to permit them to pass without interference or interruption.⁹ The term carriages, includes all classes of vehicles used for

¹ Reeve's Dom. Rel. 377.

² 46 Ill. 99.

³ 1 Seld. 492. 17 N. Y. 153. 18 id. 432. 25 id. 562. 6 Ind. 205. 13 id. 366. 18 id. 226. 8 Ohio N. S. 249. 11 id. 417. 21 Ill. 20. 22 id. 633. 7 Wis. 425. 18 id. 700. 10 Mich. 193. 11 Iowa, 421. 12 Minn. 357. 36 Mo. 484.

⁴ 25 N. Y. R. 562. 17 id. 153. 18 id. 432. 1 Seld. 492. 18 Ind. 226. 23 id. 81.

⁵ 25 N. Y. R. 562, 5, 7. 24 id. 410. 41

Barb. 366. 1 Daly, 431. 7 Hurlst. & N. 937. 4 Seld. 175. 20 Barb. 449. 5 Ohio N. S. 541. 17 id. 197. 10 Ind. 554. 22 id. 26. 6 Cal. 209. 11 Iowa, 421. 42 Mo. 187. 45 Ill. 197.

⁶ 25 N. Y. R. 566. 28 How. Pr. R. 472. 22 Ind. 26.

⁷ 9 Cush. 112.

⁸ 5 Ind. 339. 7 id. 436.

⁹ 1 R. S. 695, § 1. 2 id. (Banks' 5th ed.) 965.

the transportation of persons and property. The right of the *center of the road* is held to mean the right of the center of the *worked* part of the road; although the whole of the smooth or *most traveled* path may be on one side of the center. The traveler should therefore in passing, keep the right of the center of the worked part, although the traveled path lie entirely on the left of that center, so as to render it necessary for him to turn completely to the right of it and leave it entirely to the person he is meeting. And it is held to be no defense to an action for a collision, that he attempted to prevent it; that the road on his side was rough and rutty, and that it was more difficult for him than for the other party to turn out. Unless the obstacles to turning out are insuperable or extremely difficult, he is without excuse.¹ In the winter, when the ground is covered with snow, the center of the road means the center of the beaten or traveled track, without any reference to the worked part.² This statute has reference only to the traveling in carriages or other vehicles included under that general term. Consequently when one horseman meets another, or meets a vehicle on a highway, he is not required to turn out in any particular direction. He must use prudence and care, under the circumstances, turning to the right or left as these direct him.³ The same is the rule relative to the meeting of ordinary vehicles with railroad cars.⁴

§ 491. Within the rule governing in cases of injuries by negligence, and the law of the road as provided by the above statutes, where a collision happens upon a highway, it would in ordinary cases be sufficient to show that the plaintiff was on the right side of the road, and that the defendant drove against him. This would fix negligence upon the defendant; for he could not insist that the collision was unavoidable, which he might have prevented by keeping on his own side of the road. Yet if the street is sufficiently wide, although the defendant were on the wrong side of it, the plaintiff would not be justified in crossing over to it and interfering with him, merely because the law authorized him to drive upon that side; and if in consequence of his doing so the defendant unintentionally ran into his carriage or against him, the plaintiff would have contributed by his negligence to the injury, and would be entitled to no damages against the defendant.⁵ It is therefore held that the rule of the road is not to be held strictly where by departing from it injury can be

¹ 7 Wend. 185.

² 12 Barb. 613.

³ 24 Wend. 465, 472.

⁴ 15 N. Y. 380. 41 Barb. 375.

⁵ 2 Esp. 685. 5 id. 44. id. 273. 2 Kern. 429. 17 Barb. 94. 21 id. 69.

avoided. *Prima facie*, the party on the wrong side of the road is liable, but if it be shown that the party on the right side might easily and conveniently avoid the collision, he will be without remedy for the injury he has sustained.¹

§ 492. The same rule which prevails in relation to injuries by collisions upon the road, prevails in relation to injuries sustained by vessels running foul of each other, with this modification. If the collision is occasioned by the carelessness of the person injured, or if he in any degree contributed to it, he cannot recover from the other. If a passenger is injured by the negligent act of the persons navigating both vessels, he could bring his action against both or either of them.²

§ 493. The injury may arise from an act committed in violation of law, but without an intention to injure any one, as where one placed a pile of wood or other obstruction in the highway, by means of which the plaintiff was injured.³ If, however, the obstruction is in such a position as to be plainly visible and easily avoided, if one in the day time carelessly drive into it and is injured, it is his own fault.⁴ And if the highway was one claimed, not by having been laid out, but by user alone, and was in fact but two and a half rods wide, and it being questionable whether the wood was actually within the road as established by the use, it was held properly left to a jury to determine whether or not the wood was in the highway, for all the land within a highway fence is not necessarily subject to the right of way, and when it is not it may be occupied by the owner, and if he place an obstruction there, he is not liable for an injury which another sustains by running against it.⁵ The law of the road is not so inflexible as to forbid all occupation of highways or of the streets of cities and villages, except for the purposes of passage. Buildings may be moved along them;⁶ goods may be temporarily deposited therein in their transit to the storehouses, or for wharfage; persons and carriages may stop temporarily therein; freight, goods or fuel may be delivered therein at business or other houses. They may be repaired, and materials therefor may be deposited therein.⁷ An excavation may be made into them, extending a reasonable extent, in front of a lot where the owner is about erecting a house. Building materials may be placed therein, if that use is reasonably necessary at that time and place; and, generally, especially in a city, situations and circumstances

¹ 3 Car. & Payne, 554. But see 5 C. B.
N. S. 667. 7 Wis. 236.

² See 2 Kern. 425.

³ 6 Cowen, 189.

⁴ 11 East, 60.

⁵ 6 Cowen, 189.

⁶ 35 N. H. 257.

⁷ 4 Iowa, 199. 8 Ohio N. S. 358.

may arise where a deviation from the strict law of the road is necessary and proper;¹ but actions will lie for injuries occasioned by them, even when unaccompanied by negligence, where the party creating them had no special authority for that purpose.² And a street must not be unnecessarily nor unreasonably monopolized or used in these various ways, either in time or as to extent of occupation.³

§ 494. One is liable for injuries to the person arising from negligence in the keeping and care of animals. If he keep an animal naturally wild or ferocious, and it escapes and injures any person, he is responsible for it without notice.⁴ He is not, however, answerable for injuries to the person of another committed by domestic animals, as horses, cattle, dogs and the like, unless he has had notice that they had previously attacked persons, or is guilty of some negligence in regard to them.⁵ If, however, he knows that his bull has attacked a man, he is answerable for any injury which he afterward does, or if he knew that his dog had bitten mankind, an action will lie if the dog bite one, though he carelessly trod upon his toes.⁶ The owner's knowledge of the animal having previously committed a similar injury, must be shown, but it may be by circumstantial evidence. Where one was severely bitten by a dog, and the owner promised to make her a pecuniary recompense, but there was no proof that the dog had previously bitten any one, the court held the circumstances were not sufficient to authorize a jury to infer the knowledge.⁷ Proof that the defendant had warned a person to beware of the dog lest he should be bitten, in one case, and in another that there was a report that the dog had bitten, and that his master had thereupon tied him up, was submitted to the jury upon which to find whether the owner knew of the dog being accustomed to bite. Other similar cases are cited in the notes.⁸ The general rule in regard to animals is that their owner, or the one who harbors them, must use reasonable care to prevent their doing an injury, that care depending on the animal itself, its character and disposition, and the natural consequences arising from the want of care in keeping them from doing harm.⁹ One case holds that where one drives a number of cattle

¹ 8 Ohio N. S. 358. 12 Ind. 515. 30 id. 3 Keyes, 263. 23 Barb. 324. 30 id. 147. 53. 2 Dowl. & Ry. 255. 22 Ill. 140. 32 Wis. 73.

² 18 N. Y. R. 79.

³ 2 Str. 1264. 13 John. 339. 31 Conn. 121.

⁴ 8 Ohio N. S. 358. 7 Wis. 484.

⁵ 4 Camp. 198; but see 2 Cr. Mees. &

⁶ 2 Ld. Ray. 1583. 8 Barb. 630. 38

Ros. 496.

id. 14. 4 Iowa, 283.

⁷ 1 Stark. 285. 2 Esp. 483. 6 Wels.

⁸ 1 Coms. 515. 4 Denio, 127. Id. 500. H. & G. 697.

⁹ 26 Ind. 334.

through the streets of a city, he is held to the same degree of care, and is liable for damages in the same instances that a carrier of passengers would be;¹ as which see *ante* §105.

There is an exception to the rule of the necessity of proving knowledge, and that is where the animal doing the mischief is unlawfully in the close of another, and there commits the injury to property rightfully in the close, in which cases the action is for the trespass to the real estate, and the other injury is alleged merely in aggravation.² If the owner negligently allows an animal to be where he may do an injury, as if he allow a horse to go loose and unattended on the streets of a city where he kicks a man, the owner is liable although he was not aware of any viciousness.³

§ 495. Where the injury is sustained from an animal known by the owner to be vicious, he will be liable, although he has undertaken to secure it, if the means employed were not effectual.⁴

[§ 495*a*.] A statute in New York⁵ requires the owners of wild animals to give notice of their approach to travelers. Prior to the enactment of this statute it was held, in that state, that where a person sued for an injury caused by his horse taking fright at an elephant passing along the highway, he could not recover without showing that such was the usual effect of the appearance of an elephant upon horses, and that the owner knew it, or had notice thereof.⁶

§ 496. Every man may keep a dog for the protection of his house and his property, and may cautiously use him for that purpose, and if any one incautiously go into his yard at night after the dog is properly let loose, and he is bitten, no action will lie.⁷ So if he is bitten in consequence of being on the land of the owner of the dog where he is not entitled to go. But if he have no means of knowing the danger, and had a right to be where he was, and is not in fault in any respect, he may recover, although the owner had set up a notice warning people of the danger, which he, being illiterate, could not read.⁸ And although, as a general rule, a trespasser cannot recover for an injury received from a dog necessarily or properly kept for the protection of the grounds,⁹ yet where the defendant knowingly per-

¹ 28 Cal. 618.

¹ Esp. 203. 17 Wend. 496. 4 E. D.

² 4 Denio, 127. 1 Coms. 515. 11 Barb. 387. Smith, 63.

³ 39 N. Y. 400.

² 4 Car. & Payne, 297. Moody & M. 505.

⁴ 3 Car. & Payne, 138.

³ 17 Wend. 498. 4 Car. & Payne, 297.

⁵ Laws of 1862, ch. 112.

Moody & M. 505. 7 Taunt. 519, 520.

⁶ 38 Barb. 14.

mitted a ferocious dog to be at large upon his premises, which would worry persons passing over his fields in the day time, although technically trespassers, he was held liable for the injury committed by him upon a person so trespassing.¹

§ 497. An injury to one's person is sustained when his health or comfort is impaired by any private nuisance, or any unwholesome, noisome or offensive erection made by another, as a mill-pond which generates unwholesome odors, a hog-pen, a slaughter-house, tannery or other building where business is conducted which disagreeably infects the air of the neighborhood.² And the action may be brought against the party erecting it, or any one who continues to use it.³ But although there is yet some little doubt on the subject, the better rule would seem to be that the one who continues to use a nuisance erected by another, is not liable for the damages caused by its continuance until after notice of its character and to remove it.⁴ The better way is to give the notice before bringing the action. To maintain the action, the nuisance must affect the plaintiff; but a trifling damage will be sufficient.⁵ A public nuisance, where the injury is common to all the citizens of the state, as an obstruction in a highway or navigable river, will not warrant it unless the plaintiff has been actually injured by it.⁶ But if he falls over an obstruction by which his leg is broken, or he be otherwise injured, the action will lie. If the plaintiff's damage is not peculiar to himself, but is common to him and many others, operating in the same manner upon the individuals composing a particular class, though a portion only of the whole community, he cannot recover.⁷ It is said in one case, that nothing can be a nuisance to which the agency of man does not contribute.⁸

[§ 497a.] If an owner of lands erects a barn so built as to be a nuisance upon them, and then lets them to a tenant who continues the nuisance, the owner will be responsible for the damages occasioned thereby; but if the nuisance is occasioned by the use of the barn in the way it was intended to be used, the owner is not liable unless he

¹ 17 Wend. 496. Also 3 Keyes, 263, 269, 270, and refs. 4 Sneed, 58.

² 9 Paige, 575. 3 Barb. 157. 23 id. 460. 1 Hilton, 126. 4 City H. Rec. 87. 15 Abbott, 445. 4 Denio, 311. 4 Wis. 387. 8 Ind. 494. 12 Ohio N. S. 392.

³ 4 Denio, 311. 5 Coke, 100, 101. Willes, 583. 10 Mass. 72

⁴ 2 Kern. 486. 24 Barb. 404. 1 Dutch. 97. 3 id. 457. 30 Ala. 318. 11 Mich. 77.

1 Duvall, Ky. 254.

⁵ 7 Cowen, 609. 8 id. 146. 28 Vt. 142.

⁶ 8 Barb. 427. 6 Hill, 292. *Infra*, § 556.

⁷ 8 Cowen, 146; but see 5 Barb. 83, 84.

⁸ 10 Wis. 513.

knew or had reason to know, when he let the premises, that that use would prove a nuisance.¹

§ 498. There are a variety of cases where a man is injured in the character of husband, father or master, as where on account of the negligent acts of another, his wife, child or servant is hurt, where they are enticed away from him, or where one has criminal intercourse with his wife, or seduces his daughter or servant. So where the person seduced was the illegitimate daughter of the plaintiff's wife, who had been adopted, and bred and brought up by the plaintiff.² The law affords a remedy in all these cases, but it is not always within the jurisdiction of a justice. His jurisdiction for this class of cases is limited, in New York, to actions "*for an injury to the person*," which is not "an assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation or seduction."³ Actions for criminal intercourse with one's wife, daughter or servant, are excluded. In the cases, however, where a wife, child or servant is injured by the negligence of another, as by an accident occasioned from his carelessness or inattention, or by the unskillfulness and negligence of a physician or surgeon, the injuries are *to the person*, although not to the person of the husband, father or master, and not within the exceptions of assaults and batteries contained in the 54th section of the Code of Procedure. They would seem, therefore, to be within the jurisdiction of a justice of the peace, though in most cases it would be better to bring the action in a court having general jurisdiction, or to bring it in the name of the person actually injured. If the party injured be an infant, the action may be brought in his name as well as if he were an adult.⁴

§ 499. Enticing a wife from her husband, or a child or servant from its father or master, is a good cause of action.⁵ If a wife be enticed away by her father, bad or unworthy motives must be shown before the action can be sustained by the husband.⁶ Merely allowing the wife to come or remain in his house even by a stranger, and much less her father, from good motives, will not give the husband a right of action. In proper cases, where humanity requires it, or the conduct of the husband is such as to justify it, any party may harbor her, although done against the husband's express prohibition. Parents

¹ 23 Barb. 444. 9 Md. 108.

² 31 Barb. 273.

³ Code of Procedure, § 53, sub. 2, and § 54, sub. 3.

⁴ 21 Wend. 615.

⁵ 5 John. 196. 13 id. 322. 15 Barb. 499.

⁶ 4 id. 225.

⁷ 5 John. 196. 1 Keyes, 390. 6 Abbott N. S. 151.

may be protected in such cases, on facts which would not protect a stranger.¹ The statements of the wife that she has been abused are sufficient, where the action is for harboring her.² But when it is for enticing her away they are insufficient, as the fact itself must be proved.³ And the facts may be sufficient to justify a harboring of the wife after she has left her husband's house, when they would not excuse the advising her to leave or carrying her away.⁴ Where a defendant permitted his wife's mother to live with him, although forbidden to do so by her husband, but without having enticed her away, and not opposing the husband in his attempts to reclaim her, an action was held not to lie. Something further than this is necessary; something tending to prevent or dissuade the wife from living with her husband, although slight acts of that character will be sufficient.⁵ If the person harboring a hired servant did not know that he was such, he will not be liable for his wages unless he refuses to restore him on demand.⁶ It has been doubted whether this class of cases is within the jurisdiction of a justice of the peace in New York, not being strictly for "injuries to the person." In 15 Barb. 499, above cited, no objection seems to have been made to the jurisdiction of the justices' court, in which the cause was originally tried.

§ 500. Prior to the adoption of the Code of Procedure in New York, where one beat the minor child or apprentice of another so that the latter suffered a loss of its service, or was put to expense in having it cured, he might maintain an action before a justice of the peace for the *loss of service and expense* to which he was subjected, though the action for the direct injury to the child was an assault and battery and not within the justice's jurisdiction.⁷ The language of

¹ 21 Barb. 439. 4 id. 225. 30 id. 663. Peake, 82. 5 John. 196.

² Peake, 82. 1 Keyes, 393.

³ 30 Barb. 663. See 21 id. 439.

⁴ 30 Barb. 663.

⁵ 3 Mass. 317. 21 Barb. 439, 442.

⁶ 6 John. 274.

⁷ Cro. Jac. 618. 1 Esp. 217. Reeve's Dom. Rel. 375. Code of Procedure, § 53, subd. 2. It may be useful in connection with the text to embody here a condensed abstract of the general principles of law which relate to the corporeal punishment of minor children, apprentices and pupils in schools, laid down in Reeve's Domestic

Relations, p. 374. A parent has the right to inflict moderate corporeal punishment upon his child under full age for disobedience to his lawful commands, negligence in his business or insolent behavior. A master has the same authority over his apprentices and menial servants to whom he stands in the place of a parent, but not to servants of full age, although members of his family. In ordinary cases the master's wife does not possess the right, but if the servant is so young that the principal care over him is devolved upon her, the duty of punishing him for improper behavior belongs to her.

the Code seems however to exclude the action of the father for his loss of service and expenses as well as that of the child for his injuries. The former can hardly be called an action for *injury to the person*, although it is for a pecuniary loss in consequence of an injury to the person of the child. And it is clearly not one for "injuring personal property."

§ 501. II. ACTIONS FOR INJURIES TO REAL PROPERTY. This class of actions may be maintained for any injuries which may be committed to real estate whether direct or consequential.

§ 502. The term *real property* used in the statute is synonymous with *land*, and comprehends in its meaning any portion of the surface of the earth, whether covered with water or not, together with all buildings and erections thereon,¹ excepting such erections for the purposes of trade as are temporarily attached thereto. The spontaneous growth of the soil, as grass, trees and fruits while growing and before they are severed from it, are parcel of the real property, though crops of grain or vegetables which are sown or planted from year to year are, while growing, the personal property of the owner.² And yet such crops, if growing at the decease of the owner of the land, descend to the heir with the real property.³ Fences, and rails used as fences, although temporarily removed from their places, are part of the land, excepting where put up by a tenant or other person under an agreement with the owner that he may remove them.⁴ But rails cut on a farm and lying in heaps thereon, but not yet used in a fence, or evidently not intended to be so used on the farm, are not part of the realty.⁵ Hop poles taken down for the purpose of gathering the crop, and piled up waiting the next season, go with the land.⁶ An outgoing tenant who has placed such poles in the ground for his own use, and with intent to remove them, has a right to remove them as against his landlord, or his landlord's grantee.⁷ In like

The right of punishing a servant is personal and cannot be delegated by either master or mistress. A schoolmaster in his own right and not by delegation of the parent possesses the same power to punish his pupil for improper conduct while under his care that the parent does over his child. 9 Co. 76. 1 Ld. Ray. 310. Str. 953. Cro. Jac. 630. In each of these cases the party is not answerable unless the punishment is so disproportionate to the offense as to indicate a bad temper or bad intention in its infliction. See 1 Sid.

125, 177. Cro. Car. 197. 1 Ventr. 70. Cro. Jac. 865. 8 Mod. 120. Ld. Ray. 360. 3 Bur. 566. 1 Bl. 428.

¹ Co. Lit. 42. ² Bl. Com. 18.

³ 8 Wend. 584. 1 Denio, 550. 1 Barb. 542. 2 id. 613.

⁴ 2 Seld 597.

⁵ 2 Hill, 142. 1 Coms. 564. 20 N. Y. R. 344. 4 Greene (Iowa), 146. Id. 304.

⁶ 2 Scam. 283. 3 Greene (Iowa), 220.

⁷ 1 Kern. 123.

⁸ 36 Vt. 261.

manner, manure whether scattered on a farm or lying in heaps, constitutes a part of it.¹ This, however, is limited to that which is the produce of agricultural lands; that which is not, *e. g.*, such as accumulates in livery stables is personal property.² Straw raised on the farm is not manure.³ Growing hops are personal property.⁴ Trees and plants raised for sale by a nurseryman upon premises leased by him for a nursery, are regarded as personal property removable by him during his term. It is otherwise if raised by the owner of the land.⁵

§ 503. Within the definition given in the preceding section all water privileges, together with the right of flowing adjoining lands appurtenant to any lands of the owner, are real property, injuries to which are the subject of actions in the court of a justice of the peace.

§ 504. The owner of land lying upon a highway or stream not navigable from the ocean, is presumed to own to the center of the highway or stream, until the contrary appear. Where his deed bounds his lands "*along the highway or stream,*" or "*upon it,*" its legal effect is to grant to the center. So where the boundary line runs "*to the highway or stream*" it is understood to go to its center,⁶ and the same if it is to the "north bounds of a river, and thence easterly along the said river, so as to include so much of the island as is situated within lot No. 2, which island lies near the said north bounds,"⁷ &c. If, however, the boundary is upon the north or other line or side of the road, and along the side of the road, or along its line or side, or the north or other bank of a stream, or where a boundary line runs to a tree or stake on the north or other bank and thence along the said bank, the whole of the highway or stream is excluded from the grant.⁸

§ 505. Every man's land is in law surrounded by an imaginary fence or *close*, and every entry upon it without the owner's leave is technically termed *breaking his close*, and the law implies some damage from every breach, whether it be merely stepping upon the land, or standing off from it and doing some particular injury to it, or

¹ 2 Hill, 142. 15 Wend. 169. (Aliter in New Jersey as to that in the barn yard. 4 Dutch. 581.)

² 17 How. Pr. R. 189.

³ 22 Barb. 568.

⁴ 36 Barb. 415.

⁵ 2 East, 90. 19 Iowa, 309. 7 Barb. 268.

⁶ 15 John. 447. 4 Hill, 369. 34 Barb. 515. 36 id. 136. 23 N. Y. R. 61, 498. 2 Wis. 308. 13 id. 692. 9 Iowa, 450. 22 Cal. 484.

⁷ 14 Barb. 216.

⁸ 15 John. 447. 4 Hill, 369. 5 Denio, 599. 3 Kern. 296. 16 Barb. 160. 34 id. 515. 8 Bosw. 357, 103.

anything growing from or affixed to it so as to constitute a part of it.¹

§ 506. The leave or license of the owner to enter upon his real estate may be expressly given or implied from his acts or custom. *Express* leave is given whenever the owner invites any one or the public generally to come upon his premises or consents to the entry. Of this description of leave, is the invitation which a tavern-keeper or dealer in merchandise, by his public sign, holds out to all persons desiring to deal with him to enter his inn or shop.² *Implied* leave arises where, from the familiar intercourse of one neighbor with another, he habitually enters upon his land or into his house for friendly intercourse; where the neighbors are in the habit of going to the plaintiff's well or spring to fetch water; where neighbors and strangers go into his lands to view a curiosity, to drink at a mineral spring; or where the public are in the habit of using a way or path which the plaintiff has left open for them. In such, and a vast variety of similar cases, the consent of the owner of the soil is presumed from the acknowledged rules of friendly intercourse and good neighborhood.³

§ 507. A license, whether express or implied, may at any time be revoked by the owner of the freehold, unless it were made upon such a valuable consideration as to be sustainable as a contract, or is coupled with an interest, or is an incident to a valid grant, and necessary to the possession or enjoyment of the thing granted.⁴ And, when revoked, any attempt to exercise it after notice of the revocation, constitutes a wrongful entry.⁵ Where the license was to an individual, the notice of revocation should be given to him. If to the public, it should be given with sufficient publicity to afford reasonable information that it is withdrawn.⁶ Where, however, there is a parol license to erect upon one's own land a building affecting injuriously the light or air of the party giving it, he cannot after the building is erected revoke it. The license is a direct encouragement to expend money, and it is against conscience to revoke it after the expenditure becomes beneficial. Such a license is not within the statute of frauds.⁷ The death of the person giving the license, or his

¹ 3 Bl. Com. 209, 210. 19 John. 385.

² 12 John. 408. 2 Denio, 625. 20 Barb. 251.

³ 12 John. 408. 45 Barb. 258, and refs.

⁴ Ellis & B. 702.

⁵ 10 John. 246. 7 id. 285. 15 Wend.

380. 3 Duer, 258. 10 Barn. & C. 731. 11 Ill. 157. 15 id. 397. 5 Dutch. N. J. 571. 19 Ind. 10.

⁶ 20 Barb. 251. 7 John. 285.

⁷ 20 Barb. 251.

⁸ 3 Kent's Com. 452. *Infra*, § 513.

conveyance of the land to another is a revocation of a license.¹ The license is a complete justification for all acts within its scope, done before revocation.² A verbal agreement whereby A. is to cut the wood and brush on the land of B., and heap the brush for the wood, having the ensuing winter in which to draw the wood away, is a license, revocable at any time, as to the future, but vesting the title in the wood already cut in A., and giving him a reasonable time in which to remove it; and if he does not remove it in a reasonable time after notice by B. to do so, B. may set fire to his fallow, and is not liable for any of this wood that is burned.³

§ 508. A license to one man to enter or cross my grounds gives him no authority to take another with him.⁴ But if I authorize him to enter and do certain acts, as to cut down trees, dig clay, &c., he may take with him such tools, cattle and servants as are needful to do it.⁵ And in general a license implies an authority to do everything necessary to perform the act licensed.⁶

§ 509. An agreement for the sale of land does not of itself license the person receiving it to enter upon it,⁷ nor does an express license to enter imply a right to cut and consume timber.⁸ Much less would a contract to sell and convey land upon the performance of certain future conditions by the purchaser, give him a right to enter or cut timber before he has complied with them.⁹ Neither does an agreement made with one of several purchasers, that until all of them had executed the contract of purchase, and a certain bond for the performance of its covenants "no timber should be cut on the lot" imply a license to the purchasers, after the contract and bond are executed, to commit waste by cutting and carrying away the timber. The most that can be implied from such a contract, is a permission to the purchaser to enter in the meantime as a tenant at will and occupy the land in such reasonable manner as tenants at will lawfully may.¹⁰

§ 510. A *tenant at will* who is one who occupies the land of another by his consent, when no terms of a lease have been agreed upon as on

¹ 35 Barb. 162, 167. 6 Md. 20. 26 Mo. 178. 4 Mees. & W. 538. 8 Ad. & E. (N. S.) 757.

² 6 Hill, 61. 2 Seld. 279. 29 N. Y. R. 334. 34 id. 20. 22 Barb. 336. 3 Duer, 255. 6 id. 363. 2 Wis. 250. Id. 487.

³ 18 Barb. 347.

⁴ 1 Cowen, 570.

⁵ Jac. Law Dic. tit. License; and see 3 Keyes, 263, 270.

⁶ Willes, 195.

⁷ 9 John. 35, 331. 7 Cowen, 229. 6 Barb. 116. 35 id. 167. 2 Oregon, 260.

⁸ 9 John. 35.

⁹ Id. 331.

¹⁰ 9 John. 331. 35 N. H. 563. 3 Ind. 360. See 42 Ill. 399.

an agreement to purchase,¹ or where one has leased lands for one or more years, and after the expiration of the term remains in possession,² is not authorized to cut timber.³

§ 511. A license to enter a house with a key will not justify an entrance in a manner by which it is left in an exposed condition. A tenant being desirous to sub-let his house left it locked, with authority to his landlord to let it if an opportunity offered, and for that purpose deposited the key with his neighbor. An opportunity to let the house occurred, but the person having the key having absconded, the landlord entered by placing a ladder against the house and raising the first floor window, when after showing the house he left it in the same state as before. The house was afterward entered by persons unknown and furniture taken from it. The tenant having brought an action against the landlord for breaking and entering the house and leaving it insecure, in consequence of which his property was stolen, it was held that the entry by the window was without license.⁴

§ 512. A license to enter upon lands is given by law in a great variety of cases;⁵ as to execute legal process issuing from any of the courts; to a landlord or reversioner to see that his tenant does no waste and keeps the premises according to his duty or covenants, or to prepare for the suit involving waste, with his witnesses; to a creditor to demand or request money due or payable there; to any person entering an inn or tavern to get refreshment;⁶ to one making a lease excepting the trees, to enter and show them to a purchaser;⁷ to a purchaser of a tree, a crop, a horse or any other article upon the premises of the vendor, to go upon them to take it away.⁸ But the rule in the latter case is confined to an entry to take chattels which were sold to him upon the premises by their owner. It does not authorize one to enter upon another's lands to take away his own chattel not purchased there.⁹

§ 513. Where one by virtue of a license erects a building on another's land, the license cannot be revoked so entirely as to make the person who erected it a trespasser for entering and removing it after the revocation.¹⁰

¹ 9 John. sup. 3 Ind. 360.

⁷ 10 Co. 46.

² 2 Caines, 169. Tay. L. & T. 41, 42.
¹¹ Iowa, 583.

⁸ Bac. Ab. Trespass F. 11 East, 366.
² Vt. 107.

³ 9 John. 35, 331.

⁶ 6 John. 5. 14 id. 406. 9 Barb. 652.

⁴ 2 Dowl. & Ryl. 714.

⁵ 9 Barb. 654, &c. 20 id. 16.

⁹ 3 Bl. Com. 212. 3 Ind. 387. 26 How. ante.

Pr. R. 118.

¹⁰ 6 Verm. R. 388. See §§ 506, 507,

§ 514. A distinction is made between the unlawful or wrongful act of one who has entered upon real estate by express license of the owner, and a similar act where the entry was by license of law. In the latter case although his entry were lawful, yet if he abuses his authority his original entry is deemed unlawful, or in technical language he becomes a trespasser *ab initio*. In the other case, he is not a trespasser from the beginning.¹ Under the common law system of pleading, trespass lies against the trespasser *ab initio*, and trespass on the case against the other. But, under the Code of Procedure, this distinction is now abolished in New York, so far as the pleadings are concerned.

§ 515. If, therefore, under the rules in the last section, one who enters a tavern behave with rudeness, or one who comes upon premises with legal process, or to demand a debt payable there, commit any excess, as to break doors, assault the occupants of the house or any similar act, he is equally liable for the act as if he had not been authorized in the first place to enter. But if one enters a house to serve a subpoena on a person who is then therein, he may use any necessary force to overcome any resistance he may meet with in the service, and the fact that the wife of the person to be served orders him to leave the house, will not make him a trespasser in proceeding to serve the subpoena.² The mere intention to do an unlawful act where the intention is not carried into effect will not warrant a recovery. Thus where one distrained a horse doing damage, and was leading it toward a pound with intent there to impound it before he had applied to the fence viewers to appraise his damages, and the owner undertook to prevent him by force, it was held that the distrainer was not a trespasser from the beginning.³

§ 516. The entry upon another's lands to warrant an action must be with some degree of fault, for if I, as I lawfully may, with my dog drive my neighbor's cattle off from my land and the dog follows them just into his land from which I call him as soon as possible, I am in no fault whatever and an action will not lie.⁴ But if there is any neglect, although the injury be slight, the action will lie, as where one in cutting the grass in his own field carelessly cut over the line and by mistake mowed a little of his neighbor's,⁵ or where in removing obstructions from a highway he carelessly or unneces-

¹ 13 John. 414. 5 Wend. 506. 4 Denio, 319. 11 Barb. 390. 20 Ind. 469. *Infra*, § 704.

² 20 Barb. 16.

³ 20 John. 427.

⁴ Poph. 160. 5 Denio, 255. 1 Cowen, 87 n. *Infra*, §§ 538, 541.

⁵ 3 Lev. 37.

sarily injures his neighbor's crops, fences or buildings.¹ The action may be maintained even though no damage was proved, whether the injury was little or great, and even if it were a positive benefit to the owner of the soil.² Where one enters the premises of A. with a crowd of persons, who, as he knows, have procured admission by the violence of another, he is a trespasser.³ It is not necessary that the act be willful to make it a trespass; that it was ignorantly committed is no excuse.⁴

§ 517. When a highway is impassable, or is obstructed by the owner of the land over which it runs, one may of necessity pass over the adjoining lands, and when foundeours he may remove a fence to pass around the obstruction. It is otherwise, however, if the road is his private one, for it is his own fault if it is not kept in repair.⁵ If a public road is unlawfully obstructed, any person who wishes to use the highway may remove the obstruction, and for that purpose may enter upon the land of the party erecting or continuing it, doing as little damage as possible.⁶

§ 518. Where the defendant ascended in a balloon which descended into the plaintiff's garden, and the defendant becoming entangled in it and in a perilous condition, called for help, and a crowd came to his assistance treading down the garden, it was held that the defendant was answerable for the injury.⁷

§ 519. The action may be brought by the tenant in possession, if the injury is done to the crops or fixtures, or to any portion of the premises in which he has the property; and in this case he may maintain his action against the owner of the land, for so far as all his interest is concerned, the close is his.⁸ The same rule applies to the case of a purchaser by contract who is in possession, or any other rightful possessor,⁹ and to one who has acquired a right to the crops alone or to dig gravel and clay, for the law judges such person in actual possession so far of the land.¹⁰ But where the injury is to the reversion, as when timber is cut or other acts of waste committed which damage the owner of the estate, the reversioner may bring his

¹ 7 Conn. 125.

⁷ 19 John. 381.

² 21 Wend. 188. 1 Hilton, 39. 17 Conn. 288. 7 Ind. 38.

⁹ 9 John. 108. 9 Cowen, 39, 43. 2 E. D. Smith, 200. Id. 523. 1 Ohio, 251. 3 Greene, Iowa, 548. 4 id. 461.

³ 28 How. Pr. R. 98.

⁴ 23 Cal. 306.

¹⁸ 18 Barb. 80. 17 Ind. 213. 26 id. 386.

⁵ 7 Barb. 89. Id. 309. 2 Show. 28. Doug. 745. 2 Allen, Mass., 543.

See 42 Ill. 150. Id. 399.

¹⁰ 9 John. 108, 143.

⁶ 18 Wis. 265.

action in New York by statute.¹ And where the injury is to crops growing upon a farm worked by the tenant upon shares, the landlord and tenant should unite in the action.²

§ 520. Inasmuch as a justice of the peace in New York has no jurisdiction of an action where the title to real property shall come in question,³ the plaintiff in an action for injury to real property can only show his possession in order to maintain his action.⁴ This is usually shown by his fencing, cultivating or otherwise improving it, or performing any ordinary acts of ownership over it, as by using it for a wood lot.⁵ Making pole bridges over a ditch by the side of a road, for driving cattle into a swamp, and the ranging of cattle on the same, and occasionally cutting a few trees thereon, is not a sufficient possession, nor is cleaning out a fishing place in a public river.⁶ But it is not necessary that every part be inclosed. The actual occupancy of a part of a farm, a portion of which only is inclosed, with a claim of title to the whole, is sufficient to show possession of the whole.⁷ The plaintiff may show his own acts and declarations at the time of his entry, and his deed in order to determine the extent of his claim of possession as well as his acts of ownership. And this would not be the involving of a question of title within the statute, but merely the establishing of his possessory right. The deed it is true may be used as evidence of title, but in such a case it may also be used as evidence of possession only, or for other purposes than to show title.⁸ If there is no actual possession, the plaintiff must prove title to allow him to recover, and this cannot be done in a justice's court.⁹ Where land is unoccupied, so that no actual possession can be proved, the person holding the legal title is deemed to be in possession so as to maintain an action for an injury to it.¹⁰

§ 521. Where a tenant at will commits voluntary waste, as by cutting timber, the waste terminates the tenancy, and the owner may bring his action against him.¹¹

§ 522. The possession of land occupied by a highway is in the owner subject to the use of the public for traveling, and he may

¹ 1 R. S. 750, § 8. 3 id. (Banks' 5th ed.) 39. 29 N. Y. R. 9.

² 3 John. 216.

³ Code of Procedure, § 54, subd. 2.

⁴ 6 Hill, 537. 20 Barb. 311. 27 id. 214.

⁵ 14 Wend. 239.

⁶ 2 Jones' Law, N. C. 93. 12 John. 425.

⁷ 1 Caines, 353. 12 John. 452. Code, § 82. 31 Ill. 446.

⁸ 25 N. Y. 180. 42 Barb. 353.

⁹ 8 Cowen, 115. 25 N. Y. 180.

¹⁰ 12 John. 183. 10 Wend. 639. 1 East, 244. 2 Str. 1238.

¹¹ 7 John. 1. 9 id. 35. 4 Kent, 118. Taylor L. & T. 386.

maintain an action against any one who appropriates any portion of it for any other purpose, or who cuts timber upon it or digs into it.¹ By the act of laying out the highway the public acquires the right of preparing it for traveling and using it for that purpose. In doing this the public authorities may use the timber growing in it on any one's farm which may be requisite to repair it and the bridges upon the same farm.² Subject to this every other right in it belongs to the owner as exclusively as before. The qualified possession which the corporation of a city or village have in the streets, is not sufficient to sustain an action by them for an injury to it as to their real estate.³ But the trustees of a religious society, whether incorporated or not, have sufficient possession of their church to maintain an action for an injury to it.⁴

§ 523. Where a lease is for a fixed term, or is terminated by the tenant, he is not entitled to emblements or crops growing and not harvested at the end of his term, although they were sowed or planted by him. If, however, the lease is for the life of a person, or terminable upon any uncertain event, as the will of the landlord, or by act of law, the tenant is entitled to any crop which he has sowed or planted before the happening of the event which puts an end to his lease.⁵ If the land is underlet, and the original lease is terminated by the lessee, the under-tenant will be entitled to the growing crop.⁶ So the rule is the same where a man dies, his representatives taking the crops.⁷ But if the lease is determined after the ground is plowed, but before crops are sowed, the tenant has no right to the crops afterward sowed.⁸ Where the landlord mortgages the land, and the mortgage is subsequently foreclosed, the crops will pass to the purchaser;⁹ but if the mortgagor has agreed with the tenant that he may take off any crops he may raise on the lands, and he subsequently sows in good faith, he will hold the crops in preference to the mortgagee, or a purchaser on foreclosure.¹⁰

§ 524. The owner of a leasehold interest in lands with buildings may recover his damages for the negligent injury or destruction of

¹ 16 N. Y. R. 97. 31 id. 151. 11 Barb. 390. 27 id. 543. 15 John. 447. 20 id. 743. 2 id. 357. 20 Wend. 121. 6 Mass. 454. 6 Peters, 498. 9 Iowa, 450. Id. 594. 16 Ind. 338. 5 Wis. 27. 28 Conn. 165.

² 1 R. S. 525, § 126. 2 id. (Banks' 5th ed.) 415, § 185. 6 Paige, 272.

³ 1 Blackf. 88.

⁴ 9 Wend. 414.

⁵ Taylor L. & T. 80, &c. 10 John. 360. Id. 424. 15 Ill. 397. 3 Bing. 11.

⁶ Taylor L. & T. 81. 4 Har. & J. 139.

⁷ Taylor L. & T. 81.

⁸ Taylor L. & T. 82. 4 Hay. 17.

⁹ 8 Wend. 584. 2 Denio, 174. 6 Barb. 370.

¹⁰ Lalor, 196.

the buildings.¹ And if he erect buildings upon the land in an exposed and hazardous situation from the existing use of the adjoining lands, he is not chargeable with negligence within the rule that if the plaintiff's negligence concurs in producing the injury he may not recover. Where the plaintiff builds near a smithy, or on the track of a railroad, or near the usual course of a steamboat, he may recover for its loss by fire occasioned by the negligence of the smith, or the servants of the railroad or steamboat companies.²

§ 525. Every owner of land has a right to use it in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lot. I can, therefore, maintain an action against my neighbor who digs a pit on his own land so near mine that it causes my soil to fall into it. But he has a right to dig a pit on his own land, if necessary to its convenient use, where it can be done without injury to mine in its natural state, and I cannot deprive him of this right by erecting a building on my lot, the weight of which will cause my land to fall into the pit. And if, in the exercise of ordinary care and skill in making an excavation for the improvement of his own lot, he digs so near the foundation of a building on my lot as to crack it and cause it to settle, he is not liable for any injury.³ Some doubt was thrown around these principles in 4 *Coms.*, 196; but subsequent cases affirm the doctrine as here stated.⁴ If a landlord is under contract to repair, which he neglects to do, he is liable for any injury, arising from such neglect, to the adjacent owner, and happening during the tenancy.⁵

§ 526. The action may be maintained for injuries to land, occasioned by the defendant's cattle or fowls or inanimate chattels, as well as for direct injuries by wrongful act or negligence. The owner of such animals as are not restrained by fences must keep them on his own premises at his peril, and he is accountable for any injury they do to his neighbors. He is not liable, however, for damages committed by such animals as are usually restrained by fences, if they escape from his premises into his neighbor's land through the defect of a fence which the latter is bound to repair.⁶ It is, therefore, important to examine the rules in relation to the maintenance of fences.

¹ 25 N. Y. 334. 6 Duer, 363.

22 Mo. 566. 31 id. 411. 13 Minn. 442.

² 1 Denio, 91.

⁴ See 19 Barb. 21 id. and 1 Dutcher,

³ 4 Paige, 160. 17 John. 92. 19 Barb. supra.

380. 21 id. 409. 23 id. 458. 2 *Coms.* 162. ⁵ 43 Barb. 408.

25 Vermont R. 465. 1 Dutcher, N. J. 356. ⁶ 12 John. 433.

§ 527. The statute of New York provides the following rules in relation to division and other fences:¹ (§ 30.) Where two or more persons shall have lands adjoining, each of them shall make and maintain a just proportion of the division fence between them, in all cases where one-half, or more, of each of such adjoining farms or lands shall be cleared or improved.² (§ 31.) Where two or more persons shall have lands adjoining, and not within the provisions of section 30, each of them shall make and maintain a just and equal proportion of the division fence between them, except the owner or owners of either of the adjoining lands shall choose to let such lands lie open to the public. If he shall afterward inclose it, he shall refund to the owner of the adjoining land a just proportion of the value at that time, of any division fence that shall have been made and maintained by such adjoining owner, or he shall build his proportion of such division fence.³ (§ 32.) Where a person shall have a farm or lands lying open, one-half or more of such farm or lands being cleared or improved, he shall refund to the owner of the adjoining land a just proportion of the value, at the time this act shall take effect, of any division fence that shall have been made and maintained by such adjoining owner, or he shall build his proportion of such division fence.⁴ (§ 33.) If disputes arise between the owners of adjoining lands, concerning the proportion or particular part of fence to be maintained or made by either of them, such dispute shall be settled by any two of the fence viewers of the town. (§ 34.) When any of the above mentioned matters shall be submitted to fence viewers, each party shall choose one; and if either neglect, after eight days' notice, to make such choice, the other party may select both. (§ 35.) The fence viewers shall examine the premises and hear the allegations of the parties. In case of their disagreement, they shall select another fence viewer to act with them, and the decision of any two shall be final upon the parties to such dispute, and upon all parties holding under them. (§ 36.) The decision of the fence viewers shall be reduced to writing; shall contain a description of the fence and of the proportion to be maintained by each, and shall be forthwith filed in the office of the town clerk. (§ 37.) If any person, liable to contribute to the erection or reparation of a division fence, shall neglect or refuse to make and maintain his proportion of such fence, or shall permit the same to be out of repair,

¹ 1 R. S. 353 (Banks' 5th ed.) 833. See 2 Wis. 10 for some provisions of a similar law in that state.

² As amended 1866, ch. 540, § 1.

³ As amended by the same statute, § 2.

⁴ As amended id. § 3.

he shall not be allowed to have and maintain any action for damages incurred, but shall be liable to pay to the party injured all such damages as shall accrue to his lands, and the crops, fruit trees and shrubbery thereon, and fixtures connected with the said land, to be ascertained and appraised by any two fence viewers of the town, and to be recovered with costs of suit; which appraisement shall be reduced to writing, and signed by the fence viewers making the same, but shall be only *prima facie* evidence of the amount of such damages.¹ (§ 38.) If such neglect or refusal shall be continued for the period of one month after request in writing, to make or repair such fence, the party injured may make or repair the same at the expense of the party so neglecting or refusing, to be recovered from him with costs of suit. (§ 39.) If any person who shall have made his proportion of a division fence, shall be disposed to remove his fence, and suffer his lands to lie open to the public, he may do so, provided, such farm or lands are not one-half, or more, cleared or improved at any time between the first day of November in any one year, and the first day of April following, but at no other time, giving ten days' notice, to the owner or occupant of the adjoining land, of his intention to apply to the fence viewers of the town for permission to remove his fence; and if, at the time specified in such notice, any two of such fence viewers, to be selected as aforesaid, shall determine that such fence may with propriety be removed, he may remove the same. (§ 40.) If any such fence shall be removed without such notice and permission, the party removing the same shall pay to the party injured, all such damages as he may sustain thereby, to be recovered, with costs of suit. (§ 41.) Whenever a division fence shall be injured or destroyed by floods, or other casualty, the person bound to make and repair such fence, or any part thereof, shall make or repair the same, or his just proportion thereof, within ten days after he shall be thereunto required by any person interested therein. Such requisition shall be in writing, and signed by the party making it. (§ 42.) If such person shall refuse or neglect to make or repair his proportion of such fence, for the space of ten days after such request, the party injured may make or repair the same at the expense of the party so refusing or neglecting, to be recovered from him with costs of suit. (§ 43.) Witnesses may be examined by the fence viewers on all questions submitted to them; and either of such fence viewers shall have power to issue subpœnas

¹ As amended ch. 261 of Laws of 1838. 1 R. S. (Banks' 5th ed.) 833, § 37.

for and to administer oaths to said witnesses, and each fence viewer and witness thus employed shall be entitled to one dollar and fifty cents per diem; such fence viewers, or a majority of them, shall determine what proportion thereof shall be paid by each of the parties interested in such division fence, and reduce their determination to writing, and subscribe the same and file it in the office of the town clerk where such fence viewers shall reside. The party refusing or neglecting to pay such fence viewers, or either of them, shall be liable to be sued for the same with costs of suit.¹ (§ 44.) Whenever the electors of any town shall have made any rule or regulation, prescribing what shall be deemed a sufficient fence in such town, any person who shall thereafter neglect to keep a fence according to such rule or regulation, shall be precluded from recovering compensation in any manner for damages done by any beast lawfully going at large on the highways, that may enter on any lands of such person, not fenced in conformity to the said rule or regulation, or for entering through any defective fence. (§ 45.) When the sufficiency of a fence shall come in question in any suit, it shall be presumed to have been sufficient until the contrary be established. In addition, the statute of 1866, already referred to, provides (section 4) that, "Where two or more persons shall own lands adjoining, in case either of them shall sell, convey or devise such lands, or any portion thereof, the owner of any division fence that shall have been theretofore made and maintained by him, shall not be deprived of his interest therein in consequence of such sale, except so far as it relates to the grantor; and in all cases where such sale or devise shall interfere with or affect the division fences existing between such adjoining owners at the time of such sale, or on receiving such devise, a subdivision of such division fence shall then be made by all the adjoining owners affected thereby, and each adjoining owner shall refund to the owner of the adjoining land a just proportion of the value at the time of such sale, or on receiving such devise, of any division fence that shall have been theretofore made and maintained by such adjoining owner, or that shall have been made and maintained by the person from whom he received such title, or the adjoining owner shall build his proportion of such division fence. The value of such fence and the proportion thereof to be paid by such person, and the proportion of the division fence to be built by him, shall be determined by any two of the fence viewers of the town.

¹ As amended id. § 6.

[§ 527*a*.] Notwithstanding these provisions, an appraisal by fence viewers of the expense of making a portion of a division fence, as provided in section 42, is not necessary to a recovery therefor. The amount may be proved by those who know or can judge what it was.¹ A fence built of rails, commonly called a crooked or Virginia fence, and being so built that every corner projects over the line, is a legal fence under this statute.² And the statute (§§ 30, &c.) applies as well to lands partially fenced as to those the owner chooses to let lie altogether open to common.³ And it is also held that section 44 constitutes a statutory bar to any action brought to recover damages for injuries done by cattle entering through a defective fence, which the party complaining is bound to maintain, in any town where the electors have prescribed what shall be deemed a sufficient fence.⁴

§ 528. The occupant of land who is interested in maintaining a division fence, as a tenant under a lease, or at will, or at sufferance, is entitled to avail himself of the remedies afforded by the statute as well as the owner of the fee.⁵

§ 529. The notices and requests necessary to be given under the provisions of the statute, except where its language expressly requires that they should be in writing, may be given verbally, and where the notice is in writing, its contents may be proved by parol.⁶

§ 530. An agreement relative to the proportions or particular part of a partition fence to be maintained by each, may be made between adjoining owners without resorting to the provisions of the statute, but in order to render it permanent and effectual it should be made between the owners of the freehold.⁷ And after such an agreement, if a dispute arise concerning the proportion or particular part of the fence to be maintained by each, it may be determined by the fence viewers.⁸

§ 531. The obligations of adjoining proprietors in relation to the particular fence to be supported by each, may also be determined by *prescription*, or an usage of the tenants for a "time whereof the memory of man runneth not to the contrary."⁹ In such cases, the law will assume that there have been ancient assignments or agreements to regulate them which have become lost by lapse of time;¹⁰ or, if an original agreement is proved, that it might be

¹ 17 Wend. 320. 44 Barb. 134.

² 18 Barb. 400.

³ 41 Barb. 159.

⁴ 25 Barb. 9.

⁵ 17 Wend. 320.

⁶ 3 Wend. 142, 148. 9 John. 136.

⁷ 4 John. 414. 1 Cowen, 80, note a.

⁸ 4 John. 414.

⁹ 25 N. Y. 232.

¹⁰ 6 Mass. R. 96.

altered at some future time, if the line was found to be incorrect, still the line established by prescription will govern.¹ Twenty years is sufficient to establish this prescription, and where it exists the fence viewers have no jurisdiction under the statutes.² This case may be usefully referred to on many points since covered by the statutes of 1866, *supra*.

§ 532. By the Revised Statutes it was provided that the electors, at town meeting in each town, may make "rules and regulations for ascertaining the sufficiency of all fences in such town; *for determining the times and manner in which cattle, horses or sheep shall be permitted to go at large on highways*, and for impounding animals."³ It has been doubted whether the legislature has the power to authorize a regulation to permit cattle to go at large and depasture upon the highway where it runs over the land of another person than their owner. But the decisions were favorable to its exercise and sustained the statute.⁴

§ 533. A recent statute, however, changes this, and forbids any such going at large on our highways. It is found in the Laws of 1862, chapter 459, as amended by chapter 814 of the Laws of 1867, and chapter 424 of those of 1869, which read as follows: (§ 1.) It shall not be lawful for any cattle, horses, sheep, swine or goats to run at large, or to be herded or pastured in any public street, park, place or highway in this state, and it shall be the duty of every overseer of highways, within his district, and of every street commissioner in any incorporated village, to seize and to take into his possession, and keep, until disposed of according to law, any animal so found running at large, or being herded or pastured; and any person suffering or permitting any animal to so run at large, or be herded or pastured in violation of this section, shall forfeit a penalty of five dollars for every horse, swine or cattle, and one dollar for every sheep or goat so found, to be recovered by civil action by any inhabitant of the town, in his own name or in the name of the overseer of the poor of the town, or by the proceedings hereinafter provided. (§ 2.) It shall be lawful for any person to seize and take into his custody, and retain till disposed of by law, any animal which may be in any public highway and opposite to land owned or occupied by him, contrary to the provisions of the foregoing section, or of any animal which

¹ 30 Barb. 81.

² 25 N. Y. R. 232.

³ 1 R. S. 341, § 5, sub. 11 (Banks' 5th ed.) p. 817, § 9.

⁴ 3 Wend. 142. 5 Denio, 255. 4 Coms. 349. 4 Barb. 56. 7 id. 297. 25 id. 9.

may be trespassing upon premises owned or occupied by him. (§ 3.) Whenever any such person or any officer shall seize and take into his possession any animal under the authority of the preceding sections, it shall be the duty of such person or officer to make immediate complaint in writing, under oath, stating the facts to a justice of the peace of the town in which such seizure occurred; and such justice shall thereupon have jurisdiction to hear and determine such matter, and shall thereupon proceed in the same manner as in civil actions, except as specially changed in this act, and shall forthwith issue a summons under his hand, stating the fact of such seizure and complaint, and requiring the owner of such animal, or any party having an interest in the same, to show cause before such justice, at a time and place to be specified in said summons, why said animal should not be sold and the proceeds applied as directed by this act; such time shall not be less than ten nor more than twenty days from the issuing of such summons. The said summons may be served by any constable of the said town, or by any elector thereof authorized so to do by the said justice, in writing thereon. Such service shall be made by posting the same in at least six public and conspicuous places in said town, and one of said places shall be the nearest district school-house, unless the said seizure shall have been made within the bounds of an incorporated village, having the schools in charge of a board of education; and in such case one of such notices shall be posted in one of the buildings in which such schools are taught. At the time and place appointed for the return of said summons, the complainant aforesaid may appear, and any party or person, owning or having an interest in said animal, or his agent duly authorized, shall be allowed by the said justice to appear in said proceeding; and on his filing with said justice an answer, under oath, subscribed by him or his agent aforesaid, denying any or all the facts alleged in said complaint, an issue shall be deemed joined in the said proceeding, and the subsequent proceedings shall be as in civil actions, so far as they can be, unless otherwise provided in this act. If no one shall appear to show cause, and the said summons shall be returned by a constable duly served, or by proof showing that fact, if served by any person other than a constable, or if the jury or the justice shall find, after a trial, that no sufficient cause is shown why such sale should not be made, as directed by this act, then the said justice shall issue his warrant under his hand, directed to any constable of the said town, commanding him to sell the said animal at public auction for the best price he can obtain therefor, and make return

thereof to the said justice, at a time and place therein specified, not less than ten nor more than twenty days thereafter. The said sale shall be made on the like notice as on a constable's sale on civil process, and the said constable shall make return as required by the said warrant, and pay the proceeds of said sale to said justice. The said justice shall thereupon adjudge the costs of said proceedings, the same amounts being allowed as in civil actions; and in addition, he shall allow to the party or officer making such seizure, for every horse or colt, one dollar; for every cow, calf or other cattle, each fifty cents; and for every goat, sheep or swine, twenty-five cents, together with the actual damages sustained by such party by reason of the trespass or breaking of such animal into his premises, and a reasonable compensation to such person or officer, to be estimated by such justice, for the care and keeping of such animals from the time of the seizure thereof to the sale; and the said justice shall be allowed the sum of one dollar for each animal so sold, and the constable the same fees as for service of a summons and execution in civil actions; and the penalty in the foregoing sections prescribed shall be paid to the overseers of the poor, or the officer or board having the support of the poor in charge. If, after paying the sums aforesaid, there shall be any surplus of the proceeds of said sale, the said justice shall pay the same to the owner or party establishing before him, on the return of said summons, or at such other time as he shall appoint, the right to the same. If no person shall claim said surplus within one year after such seizure, the said justice shall pay the same to the overseers of the poor of such town, or the officer or board aforesaid, for the benefit of the poor thereof. If such owner or party interested shall not appear and demand such surplus within said year, he shall be forever precluded from recovering any part of such moneys, and the receipt of the overseers of the poor of said town, or officer or board aforesaid, given at any time after the expiration of said year, shall be a full discharge to said justice for the same.

(§ 4.) Any owner of any animal which shall have been seized under and pursuant to the foregoing provisions, may, at any time before the justice aforesaid shall proceed to the hearing on the return of said summons, demand, and shall be entitled to the possession of such animal upon the payment to said justice of the several sums hereinbefore required to be paid to the said justice and constable, and to the person or officer by whom the seizure aforesaid shall have been made, and the penalty aforesaid, when such seizure is made by any officer, together with a reasonable compensation to the person or

officer making such seizure, for the care and keeping of such animal, to be ascertained and fixed by such justice, and upon making to such justice satisfactory proof of ownership; and if such owner shall not have appeared upon said return day, and shall excuse such non-appearance to the satisfaction of said justice, and shall make such demand at least three days before the time appointed for such sale, he shall be entitled to the custody and possession of such animal upon paying one-half of the several sums above stated, together with the whole amount of penalty, compensation and damages which the said justice shall then adjust and award. (§ 5.) In case the animal so seized under the foregoing provisions of this act shall have been so running at large or trespassing, or being herded or pastured by the willful act of any other person than the owner to effect that object, such owner shall be entitled to the possession of such animal at any time before the actual hearing shall be commenced on the return of said summons, on making the demand therefor and the proof required in the next preceding section, and on paying to such person or officer making such seizure the amount of compensation fixed by such justice for the care and keeping of such animal, and without paying any other charges; and the person committing such willful act shall be liable to a penalty of twenty dollars, to be recovered in an action at law, at the suit of the owner of such animal, or the person or officer making such seizure. (§ 6.) This section only provides for appeals, and is omitted. (§ 7.) In case any person making such seizure shall fail on said hearing to show cause sufficient to obtain such sale, the said justice shall render judgment against him for costs. And if the jury or said justice shall find from the evidence that such seizure was malicious and without probable cause, the jury or the justice may assess the amount of damages sustained by the owner by means of such seizure, and judgment shall in such case be given for double the amount assessed, with costs. Section 7 of the said law of 1867, further provides that "actions for any cause of action arising out of any proceeding had or taken, or attempted to be had or taken under the provisions of said act" of April 23, 1862, "can only be commenced within one year after the cause of action shall have accrued." This statute is constitutional.¹

§ 534. It is doubtful whether a town can, by regulation, interfere with the interior regulation of one's farm, by compelling the owner to keep his swine or other animals shut up in a close pen; and a by-law that "all hogs shall be shut up" must be construed to mean

¹ 38 How. Pr. R. 136.

merely that they shall not go at large on the highway, and not to restrain their owners from permitting them to be at large on their own lands. And if hogs at large on their owner's lands break through the defective partition fence of his neighbor, and which he is bound to maintain, no action will lie for the damage they commit notwithstanding such a by-law.¹

§ 535. Where cattle or other animals are not *lawfully* in the highway, the owner is liable for the damage they do if they break through an outer fence adjoining the highway or common, although the fence be a defective one.² Where there is no valid statute or regulation in any state allowing it, cattle cannot be lawfully in the highway except while using it for the mere purposes of passing upon it, and their owner will be liable for any damage they occasion by passing from it to the plaintiff's fields, whether they are defectively fenced or not. He is bound to keep his cattle on his own premises, and is answerable when they come on his neighbor's, except it be through the neighbor's defective division fence,³ and which is presumed to have been sufficient.⁴

In Michigan, adjacent land-owners are not obliged to maintain a division fence, but each is responsible for his own cattle.⁵

In Missouri, the owners of cattle are under no obligation to inclose them; and damages cannot be recovered for the trespasses of such cattle, unless the fields trespassed upon were legally inclosed.⁶

The common law doctrine making the owner of domestic animals a trespasser, if he permits them to stray upon the uninclosed lands of another, is not the law of Ohio.⁷ Nor is it in Iowa, where, therefore, the owner of land must make a proper fence to keep out animals running at large, or he has no claim for damages done by them.⁸

In Illinois, the common law rule, as above laid down, applies to inside fences, but not as to those on the highway; therefore, owners of cattle have the right to permit them to run at large in the highway, and owners of land must have their grounds protected by a sufficient fence before they can recover for cattle trespassing on them from the highway. But if an owner removes a partition fence, and his cattle enters on another's premises, he is liable.⁹

¹ 12 John. 433.

² 5 Wis. 27.

³ 7 Ind. 317. See 17 Cal. 308.

⁴ R. S. supra, § 527, sub. 45. 4 Denio, 101. 4 Barb. 56. Contra, 5 Iowa, 490. 5 How. Pr. R. 78.

⁵ 3 Mich. 163.

⁶ 26 Mo. 441.

⁷ 4 Ohio, N. S. 474.

⁸ 3 Iowa, 396.

⁹ 5 Gilman. 130. 12 Ill. 76. 20 id. 334. 43 id. 450. 45 id. 76.

In Indiana; the common law prevails in the absence of any order to the contrary made by the county board, which may be made under sections 1 and 2 of chap. 4 of their Revised Statutes of 1852.¹

§ 536. A brief synopsis of the rules of the common law in connection with the existing statutory provisions will show the relative duties and rights of land owners and persons having domestic animals. At the common law the tenant of a close was not obliged to fence against an adjoining one unless by force of prescription. Each person was bound to keep his own cattle within his own close, and he was answerable for all injury which they did if they escaped from it and went upon his neighbor's.² By the statute just given, section 527, in certain cases each one is bound to make and maintain half the division fence between his and his neighbor's lands unless he chooses to let his land lie open. But until the fence has been divided either by fence viewers, by prescription or by agreement, neither party is obliged to make the partition fence, and the rights of both parties remain as at common law. In this case neither party can avoid the payment of the damage which his cattle do to his neighbor. Each must keep his cattle at home at his peril.³ The owner must fence them in; the neighbor is not bound to fence them out.⁴

§ 537. Again, where the fence has been divided and made, it is intended only to protect the owner from animals *lawfully* in the adjoining close. Where then the cattle of A. broke into the close of B. and then passed on to the lands of C. through a defective fence maintained by C. between his lands and those of B., and there committed an injury to the lands of C., A. is responsible, for his cattle were not lawfully in the close of B. Had B.'s cattle passed through the defective fence and done the mischief, they being lawfully in B.'s close he would not have been liable.⁵

§ 538. At common law when the owner of cattle was traveling with them on the highway, and they escaped through an insufficient fence into an adjoining close, and the owner at once pursued them and brought them back he was not liable for the injury they may have done.⁶ This is still the rule. But the owner has no more

¹ 27 Ind. 96. See also 14 id. 317.

⁶ 6 Mass. 90. 16 id. 38. 2 H. Bl. 529.

² Vin. Ab. Fences A. Dyer, 372, pl. 10.

3 Wend. 142. 3 Hill, 38. 3 Kern. 42.

6 Mod. 314. 3 Bl. Com. 209. 19 John.

⁵ Fitzh. N. B. 298, n. 15 H. VII. 17. 2

385. 3 Hill, 38. 3 Kern. 42.

Ed. rv. 8, 49. 10 Ed. rv. 8. 5 Denio, 259.

³ 6 Mass. 100. 19 John. 385. 3 Hill, 38.

Supra, § 516. Infra, § 541.

⁴ 14 Ind. 317. 3 Hill, 38. 5 Denio, 259.

right to turn them out to graze in the highway than he has to turn them into his neighbor's field. The only right he has to the highway is to travel upon it, and if his animals are there for any other purpose they cannot be said to be lawfully there.

§ 539. The following summary of the law applicable to the subject is taken from the reporter's note to the case of *Bush v. Brainard*,¹ decided prior to the enacting of the New York Revised Statutes, and the doctrine in relation to cattle going at large must be considered as subject to the provisions contained in them as interpreted in the cases referred to. Every man is bound to keep such animals as are the subject of absolute property upon his own lands under peril of accounting for the damage which they may do to the property of other persons, subject to the following exceptions:

1. He may drive or otherwise convey them along the highway for the mere purpose of passage. In doing this if he exercise ordinary care in keeping them along the way he will not be liable for injury committed by them, although they escape into adjoining lands, if he make fresh pursuit and use proper endeavors for their return.

2. He is not accountable to the tenant of land adjoining his for the escape of such animals as are commonly restrained by ordinary fences, provided they escape through that part of the partition fence which such tenant is bound either by assignment by fence viewers, by prescription, or by agreement to maintain.² But if in the latter case they wander from the adjoining close to that of a third person, although it be through the defective fence which such third person is bound to repair, he is answerable.³ But in this case he would have a remedy over by action against his adjoining neighbor.

§ 540. He who has the care, custody, or possession of the beasts that do the damage is liable for the mischief they do; as where one depastures animals for another, and they by his negligence do an injury to the owner of land, or where he has the hogs of another in his sty, which commit a trespass.⁴

§ 541. An involuntary trespass upon one's lands is not the subject of an action;⁵ as where one who is assaulted and in danger, runs through the close of another instead of keeping the path;⁶ where cattle in passing along a highway eat herbs or corn against the will

¹ 1 Cowen, 78.

² See also 7 Barb. 297.

³ See also 3 Hill, 38.

⁴ Trials Per Pais, 201. 2 Rolle's Ab.

546, B. pl. 1. Bac. Ab. Trespass, G. 2. 31 Penn. 525. Infra, § 642.

⁵ Supra, §§ 516, 538.

⁶ 37 Hen. 6, 37, pl. 36.

of the owner;¹ where a dog jumps into a field without the consent of his master, or otherwise breaks another's close. But in the latter case if the owner have notice that the dog is accustomed to do mischief he is liable.²

§ 542. *Fisheries* are included within the meaning of the term land, and violations of their rights are injuries to real property. Fisheries are denominated *free fisheries*, *several fisheries*, and *commons of fishery*. A free fishery is an exclusive right of fishing in certain portions of navigable water either at particular times or at all times. In this class of fisheries the owner has a property in the fish before they are caught.³ A several fishery is a private exclusive right of fishing in an arm of the sea, river or other stream, accompanied with the ownership of the soil. In this class the owner has no property in the fish until he catches them.⁴ Most of the rights of fishery within this state are of this class. It exists wherever a stream containing fish passes through the land of any person, and in such case he may recover against any person who comes upon his land to fish, for the injury to his fishery, but not for the fish caught, for the reason that like other wild animals those are not the property of the owner of the fishery until he catches them.⁵ A common of fishery is where all persons have a right to fish in a river or a navigable stream, which flows and reflows and is an arm of the sea.

§ 543. In navigable or tide waters the right to fish below high water mark is common to all, except where an exclusive right to a free or several fishery can be shown by grant or prescription. But though all persons may fish, the adjoining proprietors have the exclusive right to draw a seine or take fish on their own lands, and if an island or rock in tide waters be private property, no one but the owner can use it for the purposes of fishing.⁶

§ 544. In rivers not navigable as tide waters, the owners of the land upon which they flow have the exclusive right of fishing each upon his own bank, and such right is held subject to the public use of the waters as a highway and to the free passage of fish, and in subordination to the regulations to be prescribed by the legislature for the general good.⁷

§ 545. A private pond where the proprietor raises fish is like any

¹ Rolle's Ab. 566, pl. 1.

² 1 Car. & Payne, 118, and in note (a).

³ 2 Bl. Com. 39, 40. 17 John. 195.

⁴ 3 Kent, 409. Com. Dig. Prerogative,

⁵ 2 Bl. Com. 391, 394. 7 John. 16. See

infra, § 545.

⁶ 3 Kent, 416, 417.

⁷ 3 Id. 408 to 419, 427 to 432.

other close his exclusive property, and the fish in it are his as well before as after they are caught.

In addition to this common law right of property, the legislature of New York, by a statute passed in 1864 (p. 709 of the Laws of that year, ch. 288), has allowed an action against any person who shall take any fish from a private or artificial pond, for the value of the fish so taken, and which does not seem to have been repealed by ch. 898 of the Laws of 1867, ch. 785 of the Laws of 1868, or ch. 909 of the Laws of 1869.

§ 546. Any entry upon the land or waters of another to take fish from his fishery is wrongful, and the subject of an action for damages to his real property.¹

This common law right of action has been recognized and regulated in New York, by ch. 909 of the Laws of 1869 (vol. 2, p. 2312), which, in sections 13 and 14, provides that "any person trespassing upon lands owned or occupied by another, for the purpose of shooting, hunting or fishing thereon, after public notice by such owner or occupant as provided in the following section, shall be deemed guilty of trespass, and shall be liable to such owner or occupant in exemplary damages for each offense, not exceeding twenty-five dollars, and shall also be liable to the owner or occupant for the value of the game killed or taken. (Section 14.) The notice referred to in the preceding section shall be given by publishing an advertisement, particularly describing such land and forbidding such trespass, in the official papers of the county, or a paper published in the town where such lands are situated, for the period of three weeks, and in the months of April or May in each year, by sign-boards at least one foot square, to be put up and maintained in not less than two conspicuous places on the premises; such notices to be signed by, or have appended thereto the name of the owner or occupant."

It is doubtless the case that this statute does not do away with or affect the common law right of action, but only affords a special remedy, if its conditions are complied with.

[§ 546*a*.] Although not entirely in place here, we may now refer to a series of statutes (several of which are referred to in the last section) passed by the legislature of New York at various times, for the preservation of wild animals, fish, oysters, &c., in this state. They are found as follow: Laws of 1862, p. 874, ch. 474; of 1863, p. 800, ch. 462; of 1864, p. 709, ch. 288; of 1866, p. 895, ch. 404; *Id.* p. 1635, ch. 753; of 1867, p. 2240, ch. 898; of 1868, p. 1759,

ch. 785; and of 1869, p. 2312, ch. 909. These laws are too long to be given here; with some local provisions not here referred to, but found in other statutes, they form a very stringent code for the preservation of the various kinds of wild animals, birds and other game, fish, oysters, &c., in the state, and affix penalties for their violation, rules of evidence in cases of alleged violation, &c. All, or nearly all, of these provisions and causes of action, so far as they relate to civil remedies, are cognizable in and apply to justices' courts, and reference can easily be made to them as the cases arise.

§ 547. The owner of lands over which streams pass where the tide does not ebb and flow, and which have not been declared public highways, have the exclusive right to use them, and may maintain actions against any persons who pass over them without permission.¹

§ 548. Although a river be declared a public highway this gives the citizen no right at common law to tow on the banks thereof.²

§ 549. Among the various injuries to real property which are the subject of action in a justice's court, may be enumerated the damage sustained by flowing it by a mill-dam; the diversion from its natural course of a stream of water running to the plaintiff's mill or across his land; the confining it in a pond and discharging it at irregular or inconvenient times to the annoyance of the proprietors below;³ the obstruction of one's private road or its unauthorized use.⁴

§ 550. The rule in relation to the flowing of waters is that "every one has the right to the flow of water in his own land without diminution or alteration;"⁵ "each proprietor has an equal right to use the water which flows in the stream, and consequently no proprietor can, by use or otherwise, either diminish the quantity which would otherwise descend to the proprietors below, or throw the water back upon the proprietors above, even to improve his own land."⁶ "The true test of the principle and extent of the use is whether it is to the injury of the other proprietors or not."⁷ "Mere priority of appropriation of running water confers no exclusive use."⁸

§ 551. Within these principles it is held that where the water of a

¹ Co. Lit. 4. b. Yelv. 143. 6 Cowen, 518, and in note.

² 3 Term R. 253.

³ 3 Kent, 439, 440. 30 N. Y. 519.

⁴ 8 East, 4. 14 John. 383.

⁵ 6 East, 214. 10 Wend. 260. 23 N. Y. 42. 6 Ind. 324.

⁶ 1 Sim. & Stu. 203. 10 Barb. 518. 16 Ohio N. S. 334. 43 Ill. 387. 26 Ind. 354. *Infra*, §§ 554, &c.

⁷ 4 Mason, 400, 401.

⁸ 15 John. 213. 4 Mason, 401. Cowen

and Hill's notes, 377. *Infra*, § 554.

river is divided by an island so that only one-fourth of the stream descends on one side of the island, the owner of the shore where the largest quantity of water flows is entitled to the use of all the water flowing there, and the owner of the other shore may not place obstructions at the head of the island to cause one-half of the stream to descend on his side of the river. Nor can the latter require the other, in the use of the water, to keep up a tight and secure dam. If either can avail himself of the natural advantages afforded by his site with no dam or an imperfect one, he may do so.¹

§ 552. In Connecticut, where the defendant raised his dam below on the same stream with the plaintiff's mill, which at first did not affect the plaintiff's water wheel, but afterward when he had occasion to lower it, clogged it with back water, it was held that an action lay.² In England the occupier of a mill maintained an action for forcing back water to his injury, although he had within a few years previously erected a wheel requiring less water than he had previously used.³

[§ 552*a*.] A riparian proprietor, who owns to the center of the stream, may maintain an action for the diversion of water against the one owning the other half, even though the plaintiff makes no valuable use of his share of the water.⁴ The only exception is where both parties draw water from the same dam, in which case, in the absence of any agreement or prescription, each has the right to continue to use the water whatever the effect may be on the other.⁵

§ 553. In all cases where an unlawful or wrongful act is committed upon the real property of another, the law implies an injury, and in an action for it, nominal damages must be given.⁶ The flowing of land by means of another's unauthorized dam though in the least possible degree, is within this rule.⁷ But in a case where the plaintiff complained that the defendant erected a dam above him, on a stream which passed through his land, and thus caused the water to run in a different channel and with greater violence than before, and thus injured his banks and premises, and the jury found the plaintiff's banks were not injured by the dam, but added that the defendant had no right to stop the water in the summer time, it was held that an entry of a verdict for the defendant ordered by the

¹ 10 Wend. 260. Cowen and Hill's Notes, 377.

² 9 Conn. 162.

³ 1 Barn. & Ald. 253.

⁴ 34 Barb. 485.

⁵ 30 N. Y. 519.

⁶ 6 Wels. H. & G. 353. 6 Paige, 443.

42 Penn. 58.

⁷ 1 Rawle, 27.

judge on the finding, was right; that flowing water is *publici juris*, and an individual can only acquire a right to it by appropriating so much of it as he requires for a beneficial purpose; and that therefore the plaintiff could not recover damages for the mere erection of a dam, but was bound to allege and prove that he had sustained an injury from the want of a sufficient quantity of water.¹ If a person buys premises already overflowed by water, for which injury no compensation in gross has ever been made, the purchaser may recover for the damages accruing subsequent to the sale to him.²

§ 554. One may not divert the water from running in its natural course to another's mill; and in order for a plaintiff to maintain an action for thus violating his rights, it is sufficient to show his possession of the mill.³ And the action must be brought by the one in possession, except for such an injury as affects the reversion.⁴ By the prior erection of a mill upon a stream of water, one does not gain an exclusive right to use the water, against another who erects a dam above him, by which the water is in part diverted, and he in some measure injured.⁵ In California, however, a different rule prevails; a prior occupation there, not for speculation, but for some useful purpose, as for mining purposes, or for grist or saw-mills, giving a prior right,⁶ and one that may be transferred.⁷ Each owner has a right to the reasonable use of the water flowing over his land, yet he has no right to use the water as he pleases, or to stop the natural flow of the stream so as to destroy or render useless the mills below him, and if he either detain the water unreasonably or let it out of his pond in such unusual quantities as to prevent the owners below from using it, and to deprive them of a reasonable participation in the benefits of the stream, he is liable to them for the injury they sustain thereby.⁸ But a party over whose land a stream runs may use and detain the water for a reasonable time and in a reasonable manner, for culinary, family and agricultural purposes, or for the purpose of carrying on mills or other manufacturing establishments; but he must not detain the water unreasonably, nor let it off in unusual quantities to the annoyance of his neighbor; and while he may not, without sufficient cause, materially reduce its quantity or quality (he may use the whole for ordinary purposes, and the grati-

¹ 4 Dowl. & RyL. 588. See also 6 Ind. 324.

² 15 Wis. 101.

³ 2 Har. & McHen. 473.

⁴ 20 Barb. 311.

⁵ 15 John. 213. Supra, § 550.

⁶ 6 Cal. 105. 8 id. 327, 336. 13 id. 220.

⁷ 13 Cal. 220.

⁸ 17 John. 306. Supra, § 550.

fication of natural wants, *sed quere*, and) may, as some cases hold, so adulterate it as is necessary or unavoidable in his business, provided it is not polluted or poisoned with unwholesome substances to the injury of the owner below.¹ And if he, by a ditch, turns extra water into the stream, he may take out the same amount, but not so as to diminish the quantity others would be entitled to.² He may divert the course of the stream over his own land, but must return it to its natural channel when it leaves it.³ Having the right to erect a dam, one is not responsible if, in consequence of the erection, the water percolates through and below the natural soil, to the injury of his neighbor, there being no unskillfulness, negligence or malice.⁴ The rules, as above, in regard to running water do not apply to the running off of surface water caused by rain or snow,⁵ and a man may fill up the wet and marshy places on his own soil for its amelioration and his own advantage, though his neighbor's land is so situated as to be incommoded by his doing it.⁶ A continued use of the water in a particular manner for twenty years will, however, afford the presumption of a grant by the owners affected by it above and below, and bar their claims.⁷ No shorter time will have that effect.⁸

§ 555. If, however, the pond created by a dam be a nuisance, no length of time will prevent the public from proceeding to abate it, nor bar an action by an individual for a specific and peculiar injury sustained in consequence of it.⁹ An act authorizing one to build a dam on his own land upon a creek or river which is a public highway, merely protects him from indictment for a nuisance. He is nevertheless liable to an action if he thereby flows his neighbor's land, even if the act provide a summary mode of appraising and paying damages therefor.¹⁰

§ 556. A nuisance, in order to furnish a right of action, must be a private one; or if a public one, the plaintiff must have received some special injury in consequence of it.¹¹ The keeping of a large quantity of gunpowder in a wooden building in an exposed place in a city, is a public nuisance, and no action lies therefor by an individual; but

¹ 3 Kent, 440. 12 Wend. 332. 10 Barb. 518. 22 id. 297, 312. 32 id. 276. 24 Penn. 298. 29 Ala. 127. 8 Cal. 327. Id. 336. 1 C. B. (N. S.) 590. 6 Ohio N. S. 188.

² 11 Cal. 143. 15 id. 35.

³ 6 Ind. 324.

⁴ 32 Barb. 268.

⁵ 29 N. Y. 467. 9 Cush. 171. 11 id. 192. See 1 Beasley, 280.

⁶ 29 N. Y. 467.

⁷ 3 Paige, 605. 6 id. 441.

⁸ 21 N. Y. 241.

⁹ 9 Wend. 316. 3 Paige, 577. 6 id. 435.

¹⁰ 5 Cowen, 165. *Infra*, § 556.

¹¹ *Ante*, § 497. 9 Md. 160.

if the building takes fire and an explosion of the gunpowder takes place, any one who is thereby injured may maintain his action against the owner.¹ So such an obstruction of a highway or a navigable stream as annoys the public, or hinders or obstructs navigation, is a public nuisance;² but if the plaintiff fall over the obstruction in the road and injure himself or his property, or if he is hindered in passing, he may bring his action for the damages he has sustained, and it is enough that he sustain some specific damage, although it be trifling in amount.³ Gas works are a private nuisance whenever they create a special injury.⁴ What amount of annoyance or inconvenience will constitute a nuisance, being a question dependent on varying circumstances, cannot be precisely defined.⁵ Whatever is legally authorized by the legislature cannot be a public nuisance.⁶

§ 557. Any one may abate a public nuisance, whatever length of time it may have existed,⁷ for no length of time will bar a prosecution for it, and the remedy by abatement is in all respects concurrent with that by indictment.⁸ Where, in a town, a house for poor people to inhabit was divided into so many apartments as to render it dangerous in a time of sickness and pestilence, it was held a public nuisance which might be lawfully torn down by any man.⁹ The statute authorizing commissioners of highways to order the removal of fences which encroach upon highways does not abrogate the right of any individual to abate them,¹⁰ and the act of abating any nuisance does not bar an action by the person injured for the specific damage he has sustained.¹¹

§ 558. Where a spring of water rises upon the land of one owner and flows across the land of another, the former has no right to divert it from its natural channel, although its waters are not more than sufficient for his domestic use, for his cattle and for irrigation.¹² Nor has he a right to detain it by a dam so as to affect the regularity of the supply to his neighbor below him upon the stream, although he wastes none of the water by the dam.¹³ He may, however, be

¹ 6 Hill, 292.

² 46 Barb. 561. 1 Stock. N. J. 754. 4 Wis. 454.

³ 4 Maule & Selw. 101. 7 Cowen, 609, 611.

⁴ 22 Barb. 297.

⁵ 12 Ohio, N. S. 392.

⁶ 28 N. Y. 396. 9 Barb. 350. 10 id. 26. 18 id. 222. 2 Duer, 618. 1 McAll. C. C. (Cal.) 212. 4 Wis. 454.

⁷ 3 Paige, 213. 7 Hill, 575. 18 Ark. 252.

⁸ 7 Hill, 575; but see 46 Barb. 561. 37 id. 301.

⁹ 15 Wend. 262. Id. 397. 18 id. 169.

¹⁰ 14 Wend. 131. Id. 250; but see 37 Barb. 301. 46 id. 561.

¹¹ 7 Cowen, 609. 37 Barb. 301; but see 46 Barb. 561.

¹² 12 Wend. 330. 1 Hurlst. & N. 627.

¹³ 3 Kent, 440. Supra, §§ 550, 554.

permitted to do this, or to make any other use of it, by a grant or license, and in this case a parol license is good, if he avails himself of it before it is revoked.¹ The license may be presumed from an exclusive adverse enjoyment for twenty years, whatever may be the injury which it causes others by corrupting, impounding, crossing, diverting or damming the water, unless the use amounts to a public nuisance.²

[§ 558*a*.] The rules relative to running streams do not apply to the case of waters running under the soil.³ A person, therefore, may ditch and drain his own soil, or sink a shaft, or open and work a quarry, or otherwise conduct his agricultural business or other lawful operations therein, without rendering himself liable, although in so doing, he draws away the water and leaves a well dry, or intercepts one of the underground sources of a spring on another's land, injuring or destroying the same.⁴ It is held, in Pennsylvania, that the rule is otherwise in the case of a well defined and constant stream flowing through a subterranean passage.⁵ The decisions in that state also hold that a party who negligently or maliciously interferes with underground waters is liable.⁶ If one, by raising water on his own land, causes subterranean springs to set back and stand on the land of another, the latter cannot recover therefor.⁷

§ 559. Where one has raised water to a given height for twenty years, although by the means it flows back upon his neighbor's land, a grant will be presumed of the privilege of using it at that height.⁸ Within this rule, if, after flowing another's land for ten years by a dam of a certain height, the owner of the dam increases the height of his dam and flows more land than he at first did, after twenty years from the commencement of the first flowing, he will have acquired a right to flow to the extent he did originally, but will be answerable for all damages occasioned by the increase of the flowing.⁹ So if he repair his dam so as to raise the water higher, an action lies by him whose land is flowed, or who is otherwise injured, although the dam itself remain at its ancient height. The question is determined by the height of the water and not of the dam.¹⁰ But

¹ Cowen & Hill's Notes, p. 380.

² Cowen & Hill's Notes, 380 to 384.

³ 29 N. Y. 466. 27 Conn. 84.

⁴ 29 N. Y. 466. 21 Barb. 230. 32 id. 276. 25 Penn. 528. 45 id. 514. 14 Ind.

112. 28 Vt. 49. 12 Ohio N. S. 294.

⁵ 29 Penn. 59. 25 id. 528; but see 45 id. 514, and 6 Paige, 435.

⁶ 25 Penn. 528, 536. 45 id. 514. See also 12 Ohio N. S. 294, where a doubt is expressed whether it is not also the rule in that state.

⁷ 32 Vt. 724.

⁸ 7 Cowen, 266.

⁹ 10 Wend. 167.

¹⁰ 7 Cowen, 266.

if he has used slush boards, he may replace them by a permanent addition to the dam which does not increase the general level of the water, although the effect may be to keep the water more constantly at that level, because the dam is tighter.¹

§ 560. The owner of a dam is answerable for any damage which may be occasioned by not having built it securely. He is bound to use due diligence in so constructing it as to enable it to resist, not only ordinary floods, but such great freshets as the stream is occasionally liable to. It is no answer that it would resist ordinary floods.² Where, however, it is built upon a proper model and substantially, and is carried away without the owner's negligence, he is not liable for injuries to his neighbor below consequent upon its being carried away.³

§ 561. One is not liable for building on his own land whereby his neighbor's lights are obstructed. That it was done from bad motives makes no difference in the rule.⁴ The fact that his neighbor has had windows in his house built upon the boundary line for more than twenty years is not presumptive evidence of a grant of the right. Such presumption can be made only where the exercise of the privilege without a grant would be a trespass.⁵ In Illinois, one may acquire a right to lights, by prescription, and then they cannot be obstructed.⁶ Also in Louisiana.⁷

§ 562. Any man may lawfully enter upon the lands of another in pursuit of ravenous beasts, as bears, wolves, foxes, badgers and the like, upon principles of public benefit. He may not, however, even for this purpose, break the ground and dig for them, and if he does he is liable for the damage he causes.⁸ The rule, however, does not extend to the hunting of hares, deer or other animals not ravenous.

§ 563. III. OF ACTIONS FOR TAKING, DETAINING OR INJURING PERSONAL PROPERTY. The term *personal property*, as used in the New York Code of Procedure (section 463), includes money, goods, chattels, things in action and evidences of debt, and, with the exception of real estate, it includes everything in which one can have a valuable interest. One may have this interest in any domestic animal, as a dog or a cat, or in animals naturally wild which have been tamed,

¹ 29 N. Y. 346. 39 Barb. 600.

² 3 Hill, 531. 2 Denio, 433.

³ 8 Cowen, 175. S. P. 15 La. An. 448.

⁴ 19 Wend. 309. 23 Barb. 444.

⁵ 19 Wend. 309.

⁶ 16 Ill. 217.

⁷ 15 La. An. 316.

⁸ Cro. Jac. 321. 1 Term R. 334.

as wild geese, hares, deer in a park, rabbits in an inclosed warren, doves in a dove house, pheasants or partridges in a mew, hawks that are fed and commanded by him, and fish in a private pond or trunk.¹ So, also, in oysters that are in a distinctly marked out bed.² In the case of animals naturally wild, which are so tamed or secured, the owner has a *qualified* right of property. They continue his until they regain their natural liberty, but no longer. They do not, however, regain this liberty merely by being let loose, because many of them go and return at pleasure, and as long as they do so and do not deviate from their usual time of returning, the private ownership continues.³ Where wild geese had been tamed, the fact that they had twice strayed away was held no excuse for one who took them from their owner. The question in such a case is, whether the animal has so regained his liberty as to lose all disposition to return to its owner.⁴ Bees, when hived, or when still in sight, if they have flown away, are of this description of qualified property,⁵ as are also the young of wild animals found upon a man's land, before they are able to escape.⁶ In order to acquire a property in a wild animal by hunting him, he must be actually taken, or reduced by wounds, traps or nets, to such a situation that he cannot escape. Merely being on the point of taking him, although one have chased him with his hounds all day, will give him no right to claim him against a person who should then step in and kill him.⁷ Merely marking the tree in which bees are found does not reclaim them, nor vest the property in the finder;⁸ nor does the wounding of a deer by A, who follows the track till night, and resumes the chase in the morning, when the deer, after being chased six miles by A's dog, is killed by B, give A any property in the animal.⁹

§ 564. Where personal property belongs exclusively to any person he is said to have a *general property* in it, and is then called its *owner*. To this title possession is always presumed to attach. Where one holds goods as a bailee, or has any temporary interest therein, either in his own right and for his own use, or by authority of law for legal purposes, he is said to have a *special property* in them.¹⁰ Within this

¹ 2 Bl. Com. 391, 2, 4. 1 Park. Cr. 593. ⁵ 2 Bl. Com. 393. 7 John. 16. 1 Cowen, 4 id. 386. 17 Barb. 565. See 1 Minn. 292. 243. 15 Wend. 550.
Ante, § 545.

² 14 Wend. 42. 4 Barb. 592. 34 id. 586.
Contra, 11 id. 248.

³ 2 Bl. Com. 391, 2, 3.

⁴ 10 John. 102.

⁶ 2 Bl. Com. 394.

⁷ 3 Caines, 175.

⁸ 7 John. 16. 1 Cowen, 243.

⁹ 20 John. 75.

¹⁰ 1 Caines, 14. 12 John. 403. 7 Cowen, 294.

class are all persons who have hired personal property for a time, or who are entitled to its temporary possession, and persons having a lien upon it. Where the owner of property in the actual possession of another, has the right to reclaim it immediately, he has the *constructive possession*; as where A in York sells or gives to B a chattel which is in London, B has a right of action against any one who injures it, for which he may maintain any appropriate action.¹

§ 565. An action for the wrongful taking or detention of personal property lies, although there be no wrongful intention; as if a sheriff or constable, by mistake, take the goods of a wrong person in execution, or levy upon goods by virtue of an execution after its return day; and if this be done by direction of the plaintiff and his attorney, they are all equally liable.² So if one has purchased at a sheriff's sale, property of another person than the defendant in the execution, upon which he had by mistake levied, he would be liable for the property, if upon request from the owner he should refuse to deliver it to him, though he would not be for simply receiving it from the sheriff upon the sale.³ It is sufficient if the act be done without justifiable cause or purpose, though accidentally or by mistake.⁴

§ 566. Any one who unlawfully intermeddles with another's goods, although there be no manual interference with them, as by exercising an authority over them in defiance or exclusion of the owner, is liable for the damages he sustains in consequence of such acts.⁵ Accordingly, a constable, who having an execution against G. levied upon goods in his possession belonging to L, made an inventory of them, and took security for their delivery, was held liable;⁶ and in another case, a constable, who required a receiptor with whom he left the property, was held liable for his wrongful levy.⁷ In a more recent case, where the constable went to the place where the property was, informed the persons in whose possession it was that he had levied upon it, and requested them to keep it until he called for it, an action for the possession of the property, brought against him, was maintained,⁸ the court holding that a naked levy without any manual interference with, and without any exercise of ownership or authority over

¹ 8 Pick. 333.

² Chitty's Pl. 129. 3 Lev. 37. 7 Cowen, 735. 10 Wend. 349. See also 41 Penn. 291.

³ 2 Rolle's Ab. 556, pl. 50. Bro. Ab. Trespass, pl. 48. 6 John. 44.

⁴ 6 Wis. 319.

⁵ 6 Wis. 319.

⁶ 7 Cowen, 735.

⁷ 8 Wend. 610.

⁸ 10 Wend. 349. 15 id. 631.

it, excepting what might be inferred from the mere act of levying, was sufficient to justify an action against either the officer or the party directing him, where that levy was made without authority.¹

§ 567. It will not protect an officer or the person who directs him, if he simply, and in terms, levies on the right and title of the defendant in the execution to the property levied on, or if he only sells such right and title. The mere act of levying is wrongful, and was, under the ancient system of pleading, a trespass. It is an interference with the property of another, for which the law affords redress; for if one's property could with impunity be seized upon to satisfy the debt of another, under the pretense that the right and title of that other person was alone intended to be sold, there would be no safety for it. All that is ever sold upon an execution, is the right and title of the defendant to the goods; and unless he have some right or title which is the proper subject of seizure on execution, the act of levying is wrongful.

§ 568. Before a party can recover for an injury to property, he must show that he is either the absolute or qualified owner of it.² A sheriff or constable who has levied goods upon an execution, may maintain an action against any wrong doer who takes, detains or injures them, and proof of the execution and levy is sufficient to sustain his action, without showing the judgment.³ A purchaser must, however, show the judgment, execution and sale, in order to maintain an action against a third person, unless he has reduced the property to actual possession before the wrongful act complained of.⁴ If, however, he have purchased in good faith upon a sale upon execution, he does not lose his title to the property, even if the judgment be reversed.⁵ In an action brought by a defendant against an officer for levying upon his property, it is sufficient for the officer to show an execution in his hands regular on its face.⁶ If the action is against the plaintiff in the execution for directing a levy and sale, he must show both a valid judgment and execution.⁷ If by the plaintiff in the execution against the officer for moneys collected, it is not necessary to produce the judgment.⁸ If the officer attempts to overthrow a sale made by a debtor, on the ground of fraud, he must show a

¹ 4 E. D. Smith, 418.

² 27 Ill. 41.

³ 6 John. 195.

⁴ 7 John. 535. 12 id. 213, 215. *Infra*,

§ 574.

⁵ 8 Co. 96, b. 7 John. 535, 6.

⁶ 12 John. 395. 5 Wend. 170. 6 id.

367. 12 id. 496. 2 Denio, 86. 2 Coms. 473.

⁷ 2 Hilton, 319.

⁸ 13 Wend. 35, 40.

judgment; or, in case of an attachment, that it was regularly issued. In a case where proof of a judgment is necessary, but it is not given, and no objection is made, the same is waived, and the point cannot be raised on appeal.² If the officer brings suit against one who is not a wrong doer, he must prove the judgment as well as the execution,³ and he must do the same to justify the seizure of property in the hands of a stranger.⁴

§ 569. The action of *trover*, prior to the adoption of the Code of Procedure, was the usual one to recover the value of property which had been unlawfully appropriated by a defendant to his own use.⁵ It was in form an action upon the case, for the conversion of property of the plaintiff which had casually come into the defendant's possession *by finding*. The real grievance complained of, however, was the *conversion*, and as it was in some respects a more convenient action to maintain than trespass for the actual wrongful taking of the property, it was commonly resorted to in all cases where the defendant wrongfully converted the property, whatever might have been the manner in which he obtained its possession. Any person having either the general or special property in the thing converted might bring the action. Thus every one who was entitled to the possession of goods or chattels as against other persons than their owner, as the finder of lost property, carriers, factors, consignees, pawnees, trustees, agisters of cattle, persons who have borrowed horses to use, and indeed every bailee who was not the mere servant of the owner, might bring the action against any one but the owner.⁶ And in general where goods bailed were converted by a stranger, either the bailor or bailee might bring the action, and the one first bringing it determined the right of the other, and recovered the whole value of the goods.⁷ But where the goods were bailed to a bailee for a certain time which was unexpired, the bailor, not being then entitled to the possession, could not bring the action for that reason, as it was necessary in the action for the plaintiff to have the right of possession. The bailee then could alone bring it.⁸ What effect the provision of the Code of Procedure requiring all actions to be "*prosecuted in the name of the real*

¹ 5 Hill, 194.

² 22 Barb. 656.

³ 2 Denio, 643. 1 Hill, 118. 22 Barb. 656.

⁴ 12 Cal. 483. See as to this whole section, *infra*, § 572.

⁵ Bac. Ab. Trover, A. 15 Petersd. 190, n. 52.

⁶ 13 Wend. 63. 2 Kern. 343. 6 Barb. 362. 16 id. 595. 35 id. 298. 38 id. 574. 40 id. 383. 48 id. 339. 1 E. D. Smith, 393.

⁷ 7 Cowen, 328.

⁸ 8 John. 432. 15 Wend. 474. 9 Cowen,

"party in interest," may have upon the right of bailees to prosecute for the conversion of property of their bailors, has not hitherto been judicially determined.¹ Various cases of the kind have been before our courts, but in none of them has the question been raised. It is assumed in all of them that the Code has not changed the common law rule in this respect.² In practice it will generally be as convenient to bring the action in the name of the owner as of a consignee or other naked bailee. Where brought in the name of a consignee, and an unqualified assignment is shown, the legal presumption is that he is the owner until the contrary be shown.³ A mere *executory* contract for bailment does not give to the person named as bailee any right to the possession of the property.⁴

§ 570. Possession of personal property is *prima facie* evidence of title, and is sufficient to warrant a recovery for taking or detaining it against all persons except the owner or those who have some right or interest derived from him.⁵ Thus the finder of a chattel has a special property in it, which is good against every person but the owner or his bailee.⁶ But the finder of a chose in action has no special property in it; accordingly, where M. found a lottery ticket and gave it to W. to advertise for the owner, but none appeared, and it finally drew a prize which W. received, it was held that M. could not recover the money received upon it from him.⁷ Though possession is sufficient evidence of title to authorize one to bring a suit, as just stated, it is not such evidence of ownership or authority to sell, that third persons have a right, as against the true owner, to rely thereon.⁸

§ 571. Where one who had only a special property brought his action of trover against another who converted it, it was held that the defendant might, by showing the ownership in a third person, and that through him he held some claim to the property, and that the defendant had no special property as against the owner, mitigate the damages or defeat the action entirely. But that it was not enough to show property in a third person, without also showing some right in the defendant derived from him.⁹

§ 572. A constable or sheriff has a special property in goods upon which he has levied, and can maintain an action for them against any

¹ Code of Procedure, § 111.

² 16 Barb. 595, and other cases, *supra*, note 6.

³ 15 Wend. 474.

⁴ 4 Wis. 373.

⁵ 11 Wend. 54. 2 Seld. 209. 6 id. 570.

33 N. Y. 581. 21 Barb. 333. 1 Wis. 286.

⁶ 3 id. 621. 20 Ill. 37. 28 id. 396.

⁷ 35 Barb. 298.

⁸ 9 Cowen, 670. S. C. 5 Wend. 404.

⁹ 39 N. Y. 441, 448. 50 Barb. 142.

¹⁰ 11 Wend. 54. 16 id. 533. 4 Duer, 431.

person who, without right, takes them from him, or from any one with whom he has deposited them for safe keeping, and his right of property is in no way affected by the circumstance that the levy is excessive.¹ In such a case the officer is the only one who can bring the action. The plaintiff in the execution cannot do it,² nor the deputy, in case of a sheriff; the sheriff himself must sue.³ A constable may sue the sheriff for making a levy subsequent to his own, and selling thereon, but not selling subject to the levy of the constable.⁴ If the action be brought by the officer against the defendant in the execution for taking the goods away, or if, on the contrary, the defendant in the execution sue the officer for levying on the goods, the execution, if good upon its face, is sufficient evidence of his right without showing the judgment upon which it was issued.⁵ It is also sufficient in an action by an officer against a mere stranger, without pretense of title, who intermeddles with the goods,⁶ or a purchaser at the sale for the price bid for them.⁷ It is otherwise, however, where a stranger sues the officer and shows a title in himself prior to the levy; for then the officer can only defend himself by showing the stranger's title void in respect to creditors, and to do this must show the judgment.⁸

§ 573. An officer's right against an officious stranger depends upon his special property. His process and levy show this *prima facie*. But where the stranger, showing a title, brings the action, he can show that the officer's process was void as having been issued upon a judgment obtained without jurisdiction, in which case the officer has no special property and is not liable over. And where an officer sues to recover property levied on, and it appears that the plaintiff in the execution is the real party in the action, the officer, being a mere nominal party, must show a valid judgment.⁹

§ 574. The title of a purchaser of goods upon an execution, depends upon the validity of the judgment as well as the execution. Where, therefore, he either brings his action against the former owner, or any one in whose possession the property purchased is, he must show the judgment, execution and sale. He must also do this in defending his title against the former owner.¹⁰

¹ 1 Cowen, 322. 2 Hall, 425. 3 Hill, 215. 4 Kernan, 270. 31 Ill. 120.

² 39 Barb. 206. 1 Denio, 335.

³ 35 Barb. 620.

⁴ 19 Barb. 412.

⁵ 12 Wend. 75, and cases cited. Cowen & Hill's Notes, 1078.

⁶ 6 John. 195. 8 Wend. 445.

⁷ 5 Watts, 515.

⁸ 16 Wend. 514, 516. 2 Coms. 477. See as to this section, supra, § 568.

⁹ 16 Wend. 562. 6 Minn. 412.

¹⁰ Ante, § 568. Cowen & Hill's N. 1078, 9. 16 Barb. 46. 12 Wend. 75.

§ 575. It is quite common for a sheriff or constable, after a levy, to deliver the property levied upon to a *receiptor*, on receiving his covenant or agreement to return it when called for, or upon the day of sale. Such a disposition thereof does not change the officer's rights in it. The receiptor gains neither a general nor special property as against him. He is his mere servant or agent.¹

§ 576. As an action for taking, detaining, or injuring personal property, must be brought by the party sustaining the damage arising from the act complained of, it will often be necessary to determine the ownership of the property in question, upon the rules governing the transmission of the title in contracts of sale. The true inquiry, in all such cases is, whether the title has so passed that the property is at the risk of the vendee. If it has, the sale is *executed* and the vendee is its owner. If it has not, the contract of sale is merely *executory*, and if the goods are stolen or destroyed the vendor must abide the loss.² Whether the contract is executed or executory, depends upon whether it was intended to vest in the purchaser, a present and absolute title to the thing sold without reference to the payment of the price.³ Where a brewer sold sufficient barley, now in his brewery, to make malt enough to pay a certain sum, and delivery was then made of more than enough for the payment, but it was not removed, this was held an executed sale.⁴ But where wool was sent to New York and there sold to the plaintiff on the terms that it was to be weighed, the plaintiff to pay certain charges and none other, and a certain price for the wool and sacks, and if any of the wool had already been sold, the sale to be limited to the balance, the plaintiff paying a part down, it was held that this was an executory sale only.⁵ Delivery is not essential to the passing of the title on a sale, as between the parties, where there is nothing more to be done, but that the purchaser take possession of the goods. It may be otherwise as to third persons.⁶

§ 577. Where a mechanic is employed to make an article for me, if it be made from his own materials, or if the principal materials be his, the article is his until completed and delivered to me.⁷ If, on the other hand, the principal materials are mine, the property remains mine, notwithstanding his expenditure of labor or of materials upon it, but he is entitled to retain it under his lien for his labor and mate-

¹ 7 Cowen, 294. 2 Hall, 425.

² 15 John. 349. 1 Wts. 141. 4 id. 154.

³ 5 Duer, 340.

⁴ 25 N. Y. 278.

⁵ 3 Duer, 224.

⁶ 39 Ill. 31.

⁷ 7 John. 473.

rials furnished.¹ Thus, where a ship carpenter builds for me a ship with his own materials, although I have paid him for it in advance, the title of the ship is in him until its delivery, and if it should casually be destroyed the loss is his; but where he builds it for me of my materials it remains mine subject to his lien. In either case, an execution against the person deemed in law to be the owner may be levied upon it.² The general rule in these cases is, that under a contract for the building of anything by a person for another, no title passes to the one for whom it is built until it is finished and delivered, or at least till nothing more remains to be done upon it, and it is ready for delivery and approval, and notice thereof is given, even where payments are to be, and are made during the progress of the work, or the one for whom it is built is to furnish a small part of the materials, which he does not do.³ It is another general rule that the title to property not then in existence cannot be affected so as to vest the title when it comes into being. But crops to be sown and raised, and other farm and dairy products, are an exception to this rule; in regard to them the title vests *potentially* from the time of the executory bargain, and *actually* as soon as the subject comes into existence.⁴ On an agreement for the manufacture of shingles, to be the property of K. as fast as they are made, the title does not vest until they are made, and there has been an actual or constructive delivery, and so of other property.⁵

§ 578. The rule is the same where one takes raw materials to manufacture, as corn to make into whiskey, or wheat to be made into flour; in all such cases the title is in the one furnishing the property to be manufactured, unless the contract simply requires the return of a manufactured article of equal value as that made from the property furnished, in which cases the title passes to the receiver.⁶ So, if property is furnished to be made up on shares, as black salts to make into pearl-ashes, the same rule applies, and it will make no difference if the manufacturer gives security to the person furnishing raw materials to account for his share.⁷

§ 579. Where personal property is obtained wrongfully, the taker cannot, by any act of his own, acquire title to it by converting it

¹ 3 Seld. 433.

² 7 John. 473.

³ 1 Kern. 35. 20 N. Y. 495. 25 Barb. 76. 21 Barb. 92. 12 Ind. 252. 10 Iowa, 26. 26 id. 472. 44 id. 528. 25 Ill. 514. 565.

⁴ 32 N. Y. 417. 26 Barb. 472. See 36 Vt. 599.

⁵ 26 Barb. 472. 7 Cal. 264.

⁶ 7 Cowen, 328. 3 Seld. 433. 4 Coms.

⁷ 10 John. 287. 12 Wend. 51.

into a different species of property. It remains the property of the original owner. Thus, where timber is converted into shingles, corn made into whiskey, logs into boards, timber split into rails, wood made into charcoal, iron into bars or into a tool, grapes into wine, olives into oil, wool into garments, or leather into shoes, the title to the manufactured article remains in the owner of the raw materials, if the conversion has been made by a willful wrong doer. He can acquire no property in the goods of another by any change wrought in them by his labor and skill, however great the change may be, provided it can be shown that the improved article was made from the original material. In case of an innocent taking, if the chattel retains its original form, or may be reduced to its original materials, it belongs to the original owner; but if in such a case it has been converted into a thing of a different species, so that its identity is destroyed, as where wheat is made into bread, or olives into oil, or grapes into wine, the original owner cannot reclaim it.¹ The change of property herein spoken of is called *accession*.

§ 580. Similar questions arise in cases of *confusion* of goods, which occurs where the goods of two or more persons become so intermixed that they cannot be distinguished or separated. Where the intermixture occurs by consent, the owners become tenants in common of the property according to their respective interests.² The same rule would also govern in case of an intermixture by accident. If done otherwise, the whole property belongs to the innocent owner, as against one who has voluntarily mixed it with his own, but who is not allowed to derive any advantage from the act.³ If the intermixture is by one who does not own any, or all of the rest of the wheat, each party may recover his share.⁴ In Michigan it is held that if a married woman allows her separate property to be so mixed with that of her husband as to be undistinguishable, or acquiesces in such intermixture, it must, as to her husband's creditors, be treated as relinquished to him.⁵

§ 581. It has been said that a sale procured by fraud passes no title to the purchaser whatever may be the degree of fraud;⁶ that, in such a case, where the owner has parted with his possession to the fraudu-

¹ 5 John. 348. 6 id. 168. 9 id. 362. 10 id. 287. 3 Coms. 379. 19 Barb. 664. 21 id. 283.

id. 104.

⁴ 46 Barb. 186. 4 Bosw. 155. 31 Ill.

² 6 Hill, 461.

⁵ 11 Mich. 470.

³ 3 Coms. 389. 20 Ill. 185. 26 id. 358. 603.

10 Mich. 433. 3 Ind. 306. See 8 Minn.

467.

lent vendee, and furnished him with the external indicia of the right of selling the goods, he cannot recover the goods from an honest purchaser of the fraudulent vendee,¹ who at the time of purchase paid a good consideration for them,² and that an assignee of the fraudulent vendee, or one who bought them of him in payment of a previous debt, or a sheriff who levies upon them with an execution against him, have no title as against the original owner.³ But the late cases have so far modified the early decisions as to hold that the title does not pass in respect to property tortiously, fraudulently, or feloniously taken, but that the rule does not apply to cases where the possession of property has been acquired by purchase and delivery. If, therefore, though there is fraud in the sale, the goods are freely and voluntarily delivered, the title passes to the vendee.⁴ But where the possession is obtained by delivery, with intent to pass the property, the vendor may, nevertheless, rescind the contract, and follow and reclaim the goods, so long as he can identify them, until they have been transferred to a *bona fide* purchaser.⁵

§ 582. If the purchase be obtained by an act amounting to felony, their sale to a *bona fide* purchaser will not affect the title of the original owner.⁶

§ 583. Where goods are bought under false pretenses, or by fraud, if the seller knowing the fraud sues for the price he affirms the sale.⁷ And where one wrongfully takes goods into his own possession, and the owner recovers a judgment against him for their value, the satisfaction of the judgment transfers the title of the goods to him.⁸

§ 584. Where one repairs or renews an article for another, the title to it remains in the original owner, notwithstanding the relative value of the labor and materials bestowed upon it in repairing or renewing it may exceed its original value.⁹

§ 585. If one becomes possessed of an article belonging to another, as a wagon, and his servant changes a portion of its appendages by substituting new whiffle-trees or clevises for those attached to it when he obtained it, and the owner repossess himself of the wagon without

¹ 10 John. 185. 8 Cowen, 238. 20 Wend. 267. 3 Wend. 267. 14 id. 31. 1 Paige, 492. 5 Duer, 373. 8 Bosw. 603. Sneed, 703.

² 13 Wend. 570. Lalor, 68. 3 Barb. 703. Supra, § 581. 20. 21 Ind. 411. 22 id. 329.

³ 13 Wend. 570. 20 id. 267. 23 id. 372. 210. 34 id. 473. Infra, § 622. 23 Cal. 359. See 16 Wis. 659.

⁴ 1 Denio, 74. 32 Barb. 171. Id. 322. 215. 45 id. 501. 3 Duer, 341. 6 id. 232. ⁵ 2 Denio, 628.

⁶ Id. 8 Cowen, 238. 20 Wend. 267. 3

⁷ Duer, 373. 8 Bosw. 603.

⁸ 3 Barb. 20. 22 Wend. 285. 5 Sneed,

⁹ Supra, § 581.

¹⁰ 4 Paige, 537. 18 N. Y. 552. 31 id.

¹¹ 6 John. 168. 8 Cowen, 43. 31 N. Y.

knowledge of the change, an action will not lie against him for the taking. It seems, however, that, if upon the owner of the substituted articles demanding them, he refuses to deliver them to him he is liable for their conversion.¹

§ 586. A gift of property requires no consideration, and is made perfect by delivery; if without delivery, it will not pass the title of it to the donee so as to enable him to bring an action in relation to it; as if one should say to another, "I will give you the corn growing in that field," unless it is delivered the donee is liable for taking it away.² The delivery, however, may be inferred from circumstances as in other cases. As where a father bought a lottery ticket which he declared he gave to his infant daughter and wrote her name upon it, and after it drew a prize said the money was hers, it was held that the jury might infer a gift and delivery:³ where the donor used to leave the key of his rooms, in which the property was, with the defendant, and said that whatever he brought there he never intended to take away, but gave to defendant's wife;⁴ where a transfer was made of stock in the books of a bank;⁵ where the donor pointed out furniture then in A's house, to A's wife, and told her that he gave it to her;⁶ where a person gave to another the keys of her bureau and trunks, and told her among other things what they were, that she gave them to her, that she must take them and take good care of them; "all my property and everything I give to you; you know I have given it all to you; take whatever you please; it is all yours, but take good care of it:" In all of these cases it was held that there was a good delivery.⁷ So where the donor, when about to start on a journey from which he did not expect to return, said to a friend that he gave him what was in his trunk up stairs; that there was enough in it to take care of him for life, or a spell; but the donor did return and took possession of the room and trunk, but soon afterward died, when the donee took possession of the trunk and a pass-book therein, it was held that the gift passed both trunk and book and money in the bank.⁸ If the property at the time of the gift is in the possession of the donee's agent, that is sufficient; it need not

¹ 13 Wend. 296. 16 id. 514.

² 2 Str. 955. 2 John. 52. 7 id. 26. 12 id. 188. 39 N. Y. 111. 25 Barb. 505. 45 id. 9. 48 id. 581. 37 How. Pr. R. 481. 22 Ill. 74. 17 Ind. 410. 31 Cal. 630. 13 Minn. 43.

³ 10 John. 293.

⁴ 2 Str. 955.

⁵ 4 Seld. 358.

⁶ 23 N. Y. 502.

⁷ 45 Barb. 9.

⁸ 2 E. D. Smith, 356.

be delivered up to the donor that he may redeliver it as a gift.¹ The delivery may be to a third person for the donee.²

In the following cases it was held there was no valid gift: Where a person, just before his death, told his sister there was personal property on the farm (which he had just deeded to her), naming some of it; that it would be of no service to him, but might be to her, and that he "would give it to her," or "I will give it to you," the farm and personal property then being several miles distant:³ where a husband deposited his money in a savings bank to his own credit, saying he wanted it so either he or his wife could draw it; and both husband and wife entered their names on the signature book, opposite which the bank clerk wrote the words, "to be drawn by either," and the pass-book was given to the husband:⁴ and where a certificate of deposit was taken by a donee from where it was kept, by directions of the donor, who told the donee he gave it to her, and then directed her to put it back, and did not endorse it.

There are two kinds of gifts, *inter vivos* and *donatio mortis causa*. The first of these are between persons in health; the second in prospect or consideration of death. The main distinction between the two is that the former, when complete, is irrevocable; the latter is revocable at the donor's pleasure, and only becomes perfect at his death.⁵ Both of these kinds require delivery to make them valid.⁶

A promissory note or other paper which the donor holds against a third person, is the subject of a valid gift, as are also drafts and life insurance policies,⁷ but not the donor's own note or draft.⁸ The donee's own note may be the subject of a gift to him, the effect of which would be to cancel the debt.⁹ A wife may make gifts to her husband.¹⁰ If a parent makes a gift to his minor child, it is said that he may revoke the same, and resume the possession of the property without the infant's consent.¹¹ Gifts made by a party to one holding intimate and confidential relations with him are good; but must be scrutinized with care, the presumption being against their validity.¹²

¹ 17 Ind. 410.

² 19 Barb. 631. 1 Paige, 316.

³ 14 Barb. 243.

⁴ 23 Barb. 565.

⁵ 39 N. Y. 111. 1 Brad. 356. 2 id. 319.
Id. 339. Id. 432. 1 Redfield, 417. 34 N.
H. 439.

⁶ 16 Ohio N. S. 86. 1 Redfield, 417. 2
Brad. 319.

⁷ 1 Paige, 316. 33 N. Y. 581. 10 Bosw.
362. 1 Ellis' B. & S. 109.

⁸ 7 John. 26. 18 id. 145. 3 Coms. 93.
23 N. Y. 69. 8 Ohio N. S. 239. 9 id. 74.
43 Ill. 207.

⁹ 13 Minn. 43.

¹⁰ 28 Barb. 622.

¹¹ 22 Ill. 74.

¹² 34 N. Y. 167

And where a person claims a gift from his father, he must make reasonably strict proof to support his claim.¹

§ 587. Where animals are let for hire, their increase belongs to the person who hires them unless it be otherwise agreed at the time the contract is made.² It is otherwise, however, where they are lent. In that case the owner is entitled to the increase.³

§ 588. Where one delivers personal property to another to be returned after a certain time, at the expiration of the time it reverts to the bailor, and he may take it from one having a wrongful possession without rendering himself liable. It is otherwise, however, where the contract is in the alternative, as to redeliver the article or another of the same kind and quality.⁴

§ 589. *Liens* are within the definition of special property. They are either *general* or *specific*. A *general lien* is a right to detain the property of another in the possession of the bailee until all his claims against the owner are paid. A *specific lien*, or, as it is sometimes called, a *particular lien*, is a right to detain it until the bailee is paid for some labor or expense bestowed upon the identical property, and nothing more.⁵ Possession is necessary to create a lien, except in cases where it arises from a particular contract, as in the case of a mortgage, or from a levy, when it is supposed to be in the actual possession of the officer levying; and as a general rule where the holder of a lien parts with the possession of the property to which it is attached, his lien is lost. The lien simply extends to the detention of the property.⁶ It does not, at common law, authorize the person holding it to sell it without the consent of the owner.⁷ Such a consent may be implied from circumstances as well as by express words,⁸ and in the case of a factor he, having a right to sell, has the means of payment within his control.⁹

§ 590. A general lien is founded upon the custom of a particular trade or business and is not favored in law. It requires strong evidence of a settled and uniform usage, or a particular mode of dealing between the parties to establish it. By the custom of a trade, an agent may have a lien upon the property of his employer intrusted to him in the course of that trade, not only in respect to its manage-

¹ 45 Ill. 480.

² 8 John. 432. 12 id. 314. See Story on Bail. 194.

³ 9 Cowen, 687. 8 How. Pr. R. 270. Story on Bail. 99.

⁴ 7 Cowen, 752. Story on Bail. 283.

⁵ 2 Kent's Com. 636, &c. Story on Agency, § 375. Cross on Lien, 14, 15.

⁶ Cross on Lien, 4, 36, 38.

⁷ 2 Kent, 642.

⁸ 22 Pick. 40. Holt's N. P. 383.

⁹ 2 Kent, 642.

ment but for his general balance of accounts. This custom must, however, have been so uniform and notorious as to warrant the inference that the party against whom the right is claimed had knowledge of it, and that his dealings were in contemplation of it. It may also exist by special agreement, as where a dealer gives notice that he will not receive property for the purposes of his trade or business, except upon condition that he shall have a lien upon it, not only in respect to the charges arising upon it, but for the general balance of the owner's account, and it is shown that the owner received the notice prior to intrusting his property with the dealer. In this case the law implies that the dealing, after having received the notice, amounts to an express agreement that the general lien shall attach.¹ Whether a general lien can be created by a notice, in the case of persons who, like common carriers and innkeepers, are under a legal obligation to accept employment in their business, at a reasonable price, and have no right to impose any unreasonable terms and conditions upon their employers, or to refuse to serve them, is not settled.²

§ 591. In respect to a few classes of business the usage upholding a general lien has been so established that the courts recognize it without proof. Thus attorneys-at-law have a general lien upon their client's papers and moneys, which come into their hands in the course of their professional business, until their bills for services and disbursements are paid, and the client cannot obtain his papers, whatever may be the result of the business, without paying not only the amount due in respect to the business for which the papers were furnished, but also in respect to all other professional business.³ They have, however, no lien upon their client's moneys before it comes into their hands.⁴ They also have a lien for their costs in that particular suit upon a judgment recovered by them, which, in New York, under the Code, is not measured by the taxable costs, but covers any portion of the damages necessary to pay the amount due the attorney, by agreement, for his services in the suit.⁵ If the judgment be solely for costs, the record is notice to all the parties to the suit that the attorney has a lien for their amount.⁶ And he has the lien though he was retained by the real party in interest, and not by the nominal one whom he represents.⁷ If there is no agreement as to the amount he shall be paid, his lien is limited, under the New York Code, to the

¹ 2 Kent, 636. Cross on Lien, 15.

² 2 Kent, 637, 8.

³ 2 Kent, 640, 641.

⁴ 12 Wend. 261.

⁵ 18 N. Y. 368. 40 Barb. 442. 16 Iowa, 335.

⁶ 28 N. Y. 237.

⁷ 28 N. Y. 237.

taxable costs.¹ It does not extend to an amount due him for services not as an attorney,² nor does it give him a greater right over the papers in his hands than his client possessed when he left them with him.³ In California, this attorney's lien on judgments recovered, does not exist;⁴ nor in Indiana and Missouri.⁵ In Iowa, by the Code, section 1618, and section 2708 of the revision of 1860, the attorney has the lien from the time of giving notice to the party against whom judgment has been obtained; if the notice has not been given, the parties may settle without reference to the attorney's fees.⁶ The rule is similar in Minnesota.⁷

§ 592. Factors, among which brokers are sometimes classed, have a general lien for liabilities incurred by them in the course of their agency, whether for payments, advances or guaranty; it extends to their general balance, including those for responsibilities incurred in the execution of their agency.⁸ But if the goods of different shippers are covered by the same bill of lading, the consignee has no right to hold the goods of one shipper for his charges in respect to the goods of the other.⁹ Bankers also have a general lien upon the securities and moneys of their customers in their hands, or deposited with them;¹⁰ insurance brokers one upon the policies in their hands, and any funds received through their means;¹¹ common carriers for freight and charges upon goods carried, but not upon general balance, unless it can be shown by express agreement, or notice to the owner.¹² Calico printers, fullers in some places, packers and wharfingers have also been held to have a general lien.¹³

§ 593. Every bailee for hire (including all such mechanics, tradesmen and laborers as receive property for the purpose of repairing or otherwise improving its condition), and who by his labor and skill has imparted an additional value to it, has a lien upon the property for his reasonable charges, whether the price of the labor be agreed upon or not.¹⁴ The lien extends to the entire work upon

¹ 7 Abbott, 210 16 How. Pr. R. 160.

² 8 Mod. 307.

³ 4 Taunt. 807.

⁴ 2 Cal. 507.

⁵ 10 Ind. 102. 18 Mo. 18.

⁶ 7 Iowa, 317. 16 id. 335.

⁷ 1 Minn. 270. 8 id. 303.

⁸ Story on Agency, § 376. 6 Term R. 258. 10 Paige, 205. 26 Wend. 367. 21 Mo. 43. 10 Wis. 111.

⁹ 26 Ill. 195.

¹⁰ 3 Bro. C. C. 21. 7 Taunt. 278. 207.

Smith's Merc. Law, 339. Story on Agency, § 381. 18 Md. 372. 9 Ind. 217.

¹¹ 5 Taunt. 56.

¹² Story on Cont. § 331 (ed. of 1844). 18 Ill. 488. 20 id. 23.

¹³ Mont. on Lien, 32. Cross on id. 338, 341. Id. 352, 354. See also 19 Ind. 226. 14 Iowa, 485. 2 Kent, 635.

¹⁴ 3 Hill, 485. 7 Ind. 21. 13 Wis. 561. 15 id. 298. Cross on Lien, 24. 8 Iowa,

which the expenditure has been made, as where a carrier transports an entire cargo, he may retain the whole of it until he is paid for his services.¹

§ 594. As a specific lien is intended for the convenience and encouragement of trade only, it does not apply where the service or expense bestowed upon the property is not within the scope of some particular branch of commerce or trade. As an illustration of this rule, a farmer, or a livery stable keeper who receives horses or cattle to feed and care for, or to pasture, has no lien upon them, because the service is not that of a tradesman.² But a tavern-keeper who receives and feeds the horse of his guest has a lien upon it for the service, because it is within the scope of his trade. If, however, the tavern-keeper receives his neighbor's horses into his stable to keep by the week, month or year, he will, for this purpose, be regarded in the same light as a farmer or livery stable-keeper, and have no lien except by special agreement. Where on the other hand, a farmer or livery-stable keeper receives horses or colts to train or break, or mares to be covered by his horse, it seems that he will, for this purpose, be deemed a tradesman, and have a lien.³ At common law, the keeper of a boarding-house has no lien on the baggage and effects of his guests.⁴ A recent statute in New York confers the same rights on him as those possessed by an innkeeper, the lien extending to the goods brought upon the premises to furnish his room, although they do not belong to the boarder, but to a stranger.⁵

§ 595. The lien of a tavern-keeper is in some respects peculiar. He is bound to receive and entertain travelers, and is answerable for the loss of the goods of his guests, although they are burned or stolen by his servants or others, or lost without any fault upon his part.⁶ This rule has been applied where a sleigh load of wheat was put by a guest into an outhouse of the inn, where loads of that description were usually received, and the grain was stolen; or where the carriage containing the goods was left in an open unenclosed space near the highway, designated by the innkeeper's servant.⁷ In case of loss, the presumption is that it was by the innkeeper's fault. But he may

¹ Bac. Ab. Trover, (E.) 2 Kent, 635.

² 3 Hill, 485. 25 Wend. 653. 33 N. Y.

³ 3 Hill, 492. 28 N. Y. 252. 16 Barb. 571. 36 Barb. 70. Id. 452. 42 id. 230. 595. 23 Cal. 364. Cross on Lien, 348.

12 Mich. 52. 2 Kent, 594. 17 Ill. 302.

⁴ Cro. Car. 271. 3 Hill, 485. 3 Carr. & P. 520. 12 J. Scott, N. S. 638.

33 Cal. 558. 24 Ind. 347. See 10 id. 212.

⁵ See 2 E. D. Smith, 148.

⁷ 21 Wend. 282.

⁶ Sess, 1860, p. 771. 42 Barb. 623, 627.

show as a defense that the loss is attributable to the personal negligence of the guest.¹ For this extraordinary liability the law gives him a lien upon the goods of his guest for his reasonable charges; and this relation of landlord and guest must exist to create the lien.² One case defines a guest as one who comes and remains as he chooses, and leaves when he pleases, without any express bargain for remaining a definite time, and paying only for the actual entertainment which he receives.³ Within this or any rule, a regular boarder by the week at a hotel is not a guest.⁴ It is not necessary that one go personally to the hotel; if he sends his wife or servant for him, the relation is constituted.⁵ If one has just paid his bill, and his horses are injured while the guest is aiding in getting them out of the stall, he is still a guest, and the landlord's liability remains.⁶ If, on the other hand, he has paid his bill, and has finally left, he is not a guest, though he has left his trunk at the inn; it would be otherwise if he had left for a very short time, as a day only, or was charged for his board during his absence.⁷ Consequently, it is not necessary that he should be actually within the tavern when the loss happens, or the lien accrues. If one sends his horse or trunk in advance to an inn, saying he will soon be there himself, he will, for the purposes of both the innkeeper's liability and his lien, be regarded as a guest from the time the host took charge of them.⁸ So if he left his horse at the inn, to be fed and cared for while he went to a neighboring town to remain a few days and return, the horse will be in the innkeeper's hands as the horse of a guest, and subject to his lien.⁹ Where an agreement was made between an innkeeper and the owner of a horse, for the entertainment and keeping of the horse and a man, one day in each week, the horse to be kept in a particular stall, and fed with provender furnished by the landlord, but taken care of by the man attending him, it was held that the relation of landlord and guest existed.¹⁰ But it does not exist where a horse is left one night by one who is neither a guest at the inn nor intends to be.¹¹ Nor can it exist in the case of the keeper of a mere restaurant.¹² If the guest has left some inanimate property with the innkeeper, from the keep-

¹ 24 Barb. 384. 36 id. 70. 17 Ill. 302.
42 id. 469. 10 Ind. 212.

² 12 Mich. 52. 1 Edm. Sel. Cas. 273.

³ 25 Iowa, 553. In California an inn is said to be a place of public entertainment for all travelers who choose to visit it.
33 Cal. 558. Also, 54 Barb. 317. 5 Sand. 242.

⁴ 3 Kansas, 257.

⁵ 37 How. Pr. R. 438.

⁶ 53 Barb. 451.

⁷ 23 Iowa, 214.

⁸ 3 Hill, 485. 11 Barb. 41.

⁹ 25 Wend. 653. See 3 Hill, 485.

¹⁰ 14 Barb. 193.

¹¹ 33 N.Y. 577. 3 Hill, 485.

¹² 1 Hilton, 193.

ing of which he derives no advantage in the way of his trade, neither the extraordinary liability of the innkeeper nor his lien will attach.¹ The innkeeper's lien will be lost if he permits the goods to be taken away from his possession, although they are returned to him, there being no fraud.² And he cannot detain one horse for the charges incurred for another, where the guest has several horses kept and has taken all but one away.³ His lien for the keeping of the horse or other property of his guest is valid against the owner, although the guest did not own it, and even where he stole it, if it was received and kept without knowledge of the facts.⁴ The rule is the same if the horse is wrongfully seized under color of a legal proceeding, unless the innkeeper knew the party making the seizure was a wrongdoer at the time.⁵

The common law rules relative to innkeepers have been modified in some of the states by special statutes. In New York it is provided (Laws of 1855, p. 774, ch. 421) that, "whenever the proprietor or proprietors of any hotel shall provide a safe, in the office of such hotel, or other convenient place for the safe keeping of any money, jewels or ornaments belonging to the guests of such hotel, and shall notify the guests thereof, by posting a notice (stating the fact that such safe is provided, in which such money, jewels or ornaments may be deposited) in the room or rooms occupied by such guest in a conspicuous manner, and if such guest shall neglect to deposit such money, jewels or ornaments in such safe, the proprietor or proprietors of such hotel shall not be liable for any loss of such money, jewels or ornaments, sustained by such guest, by theft or otherwise."

Under this statute it is held that personal notice to a guest that a safe is provided, and that the innkeeper will not be liable for a loss of money, &c., unless given to him for deposit therein, is equivalent to the posting of the notice required by the act; and that, independent of the statute, if a guest who has received such a verbal notice leaves \$2,000 in gold coin in his room at a hotel, with no person therein, he is guilty of negligence, and cannot recover of the innkeeper.⁶ Also, where a guest offered a package of jewelry to a book-keeper, requesting him to put it in the safe, but made no statement of its contents, nor was asked in regard thereto by the book-keeper,

¹ 3 Hill, 439 and refs.

² 3 Hill, 492 and refs. 6 id. 43. 1 East, 4.

³ 7 Buls. 207, 217.

⁴ Jac. Law Dic. "Inns." Salk. 388.

1 Str. 556. 3 Bulst. 268. 1 Roll. Ab.

449. 3 Hill, 490. 42 Barb. 623. 1 Com. Bench, N. S. 267.

⁵ 3 Stark, 172.

⁶ 21 N. Y. 111.

who told him there was no necessity of putting it in the safe, to take it to his room, and that it will be just as safe there, whereupon it was taken to the room, and afterward stolen, it was held, the requisite notice having been published, that the landlord was not liable.¹ It is also held that if this statutory notice is given, the landlord is not liable, even for money for ordinary traveling expenses, if it is kept by the guest, and not placed in the safe.²

At common law, an innkeeper is responsible for the goods of a guest, and for losses caused by his own negligence, or that of his servants, or by the depredations of knaves and marauders within or without the house; he must guard them against the incendiary, the burglar and the thief.³ Accordingly, he was held responsible for the loss by fire of the goods of his guest in a barn, the cause of the fire, being unknown, and the guest free from negligence.⁴ This rule is, in part, modified in New York, by a statute (Laws 1866, ch. 658, p. 1415) which provides that, "no innkeeper shall be liable for the loss or destruction by fire of property received by him from a guest, stored or being with the knowledge of such a guest in a barn or other out-building, where it shall appear that such loss or destruction was the work of an incendiary, and occurred without the fault or negligence of such innkeeper."

A subsequent section provides that no animal belonging to a guest, and destroyed by such a fire, shall be deemed of a greater value than three hundred dollars, unless an agreement between such guest and innkeeper is proved that a higher estimate shall be made of the same.

A still further statute in New York (Laws of 1867, ch. 677, pp. 1727, 1728, § 2) provides that, "Every keeper of a hotel, restaurant, boarding-house or inn shall post in a public and conspicuous place in the office or public room, and in every bedroom in said house, a printed copy of this act, and a statement of the charge or rate of charges by the day, and for meals or items furnished, and for lodging. No charge or sum shall be collected or received by any such person for any service not actually rendered, or for any item not actually delivered, or for a longer time than the person so charged actually remained at such place. For any violation of this section, or of any provision herein contained, the offender shall forfeit to the injured party three times the amount so charged, and

¹ 44 Barb. 531.

² 51 Barb. 632. See 17 Ill. 302.

³ Supra, § 595.

⁴ 33 N. Y. 571.

shall not be entitled to receive any money for the meals, items, services or time charged."

§ 596. There are a variety of liens against ships and property wrecked, which do not come within the cognizance of a justice's court; as for repairs, equipment, provisions and stores, wharfage and port expenses, provided for by the New York statute.¹ There is, also, at common law, a lien for salvage in favor of a person who has saved goods from a ship on fire or otherwise in danger upon the high seas, and the rule is the same in the case of goods thrown on shore from a wreck.² This was, however, only in case of goods lost at sea, and did not extend to the case of goods sunk with a vessel in a navigable river.³ The rule of the common law in relation to goods thrown upon shore, has been superseded in New York by the provisions of the Revised Statutes entitled "Of wrecks," which, by a special proceeding, provide for the remuneration of the *salvors*, while they require the property saved to be immediately taken from them by the proper officers.⁴

§ 597. The finder of property lost upon land, generally has no *lien* upon it for his care and trouble in its preservation, but is bound to deliver it to the owner on demand, and can only recover his compensation by action upon an implied contract to pay for it.⁵ There is an exception to this rule, however, furnished by the statute in relation to estrays. It is provided that where horses at any time, and where cattle or sheep, have, between the first day of November and the first day of April, strayed upon any one's inclosed land, he may, within ten days thereafter, deliver to the clerk of the town a note in writing, containing his name and place of abode, and the age, color and marks, natural and artificial, of each estray as near as may be. He thereby acquires a lien for their keeping, the amount of which is to be ascertained by two fence viewers of the town, and for a fee of nine cents each, for the horses or neat cattle described, and three cents for each sheep, and the fees due the town clerk. If the owner does not appear to claim the estrays on or before the first day of May next after the finding, or refuses to pay the sums charged on them, the finder may sell them at public auction, upon giving twenty days' previous notice by advertisements, to be posted in three of the most public places in the town, and from the moneys may retain his

¹ 2 R. S. 493, § 1. 3 *id.* (Banks' 5th ed.) ² 2 H. Bl. 254. 3 Barb. 203. 7 *id.* 113. 795.

⁴ 1 R. S. 690, § 2. 2 *id.* (Banks' 5th ed.)

⁵ 1 *Ld. Raym.* 393. 5 *Burr.* 2732. 8 960, &c.

East, 57.

⁶ 2 Kent, 636.

charges, the fees thereon, and the expenses of the sale, and shall pay the residue to the owner, if he appear within a year to demand it. If he does not within a year demand it, it is to be paid to the supervisor of the town for the use of the town.¹ If the person on whose land the estray comes does not pursue the statutory direction, he loses all benefit of it, and has no lien upon it. We give this synopsis of this statute, which may be read in connection with the provisions of the Laws 1867, of which a copy is given; *ante*, section 533.

§ 598. The lien of a mechanic or manufacturer will attach to the article he manufactures, although the material and a part of the expense bestowed upon it is furnished by the owner. Thus, a brick-maker who manufactured a quantity of bricks upon a brick-yard furnished by its owner, who also supplied all the wood and necessities to carry on the work, and agreed to pay the workman a particular price for every thousand of the brick made upon the return of the vessel that transported them to market, was held to retain his lien until he parted with the possession of the bricks.²

§ 599. Where a contract is entered into by which one agrees to manufacture boards for another, and to transport them to market at a stipulated price, and it is provided that the manufacturer shall have a lien therefor upon all the boards delivered *after a certain quantity is delivered*, if the whole quantity made is not sufficient to enable the manufacturer to deliver the specified quantity and also to satisfy his lien, and the inability is caused by the omission of the other party to supply him with a sufficient number of saw-logs out of which to make the boards, the common law lien attaches to the last quantity manufactured, notwithstanding the special agreement.³

§ 600. A person engaging to supply one entire work, has a lien for the price or balance due upon every individual part of it, so that after delivering a part, he may retain the residue for such price or balance.⁴

§ 601. A mere creditor has no lien upon the goods of his debtor which may happen to be in his hands, and he cannot, therefore, apply them in payment of his demand.⁵ But where one advanced money on notes deposited by the payee, to whom they were given for the debt of a third person who was indebted to him, it was held that the lender had a lien.⁶

¹ 1 R. S. 351, §§ 17-29. *Id.* (Banks' 5th ed.) 831.

² 4 Wend. 292.

³ 11 Wend. 77.

⁴ 3 Maule & Selw. 167. 5 *id.* 180. 4 Coms. 552.

⁵ 15 Mass. 490.

⁶ 1 A. K. Marsh, 109.

§ 602. Wherever there is a lien, the person entitled to it may retain the goods against the owner until the money owing is either paid or tendered. The payment or tender of the money owing, satisfies the lien, and then the party owing it is entitled to its immediate possession, and if it is refused, he can maintain an action for its unlawful detention or conversion.¹ And if one having a lien upon goods claims to retain them upon a different ground when they are demanded of him, and makes no mention of the lien, he will be liable for their detention without showing a satisfaction of the lien.² So, where a factor bases his refusal to deliver property consigned to him upon a claim of a lien for his general balance, he cannot, on failing to establish that, defend on the ground of a lien for expenses and charges on that particular property.³ But if he merely omit to mention the lien when the property is demanded, or claims it for too long a time, or insists on a right to detain it on two grounds, one only of which is valid, he does not waive the lien.⁴ If, however, where there is a claim to detain on two causes of lien, in such a way as to dispense with a tender upon either, the liens are waived.⁵

§ 603. A lien may be waived by express or implied contract, as where a factor agrees that upon the receipt of his principal's goods, he will, irrespective of his balance, pay him the proceeds, or the circumstances are inconsistent with a lien.⁶ It is also waived whenever the person holding it enters into a special agreement inconsistent with its existence, or from which a waiver may fairly be inferred; as when on a purchase, the vendor gives credit by extending the time of payment, or takes a distinct and independent security for it. Here he shows that he relies, in one case upon the responsibility of the vendee, and in the other upon the new security.⁷ It makes no difference in this rule that the security is defective.⁸ But an agreement to receive security is no waiver until the security is delivered.⁹ If, however, there is an agreement to look to the personal credit of the person for whom work is done, or to that of a third person, the lien is waived.¹⁰ And this even though the person

¹ 9 Cowen, 52. 6 Wend. 608. Cross on Lien, 13.

² 1 Camp. 410. 9 Dowl. & Ryl. 31. 6 Wend. 608. 20 id. 268. 24 id. 169. 2 Denio, 643. 10 Barb. 184. 7 Ind. 21. 23 Cal. 508. 2 Bing. 23. 4 Mees. & W. 270.

³ 6 Com. B. N. S. 367. 3 Seld. 288.

⁴ 6 Wend. 608. 12 Com. B. N. S. 638.

⁵ 5 Hurlst. & N. 931.

⁶ Cross on Lien, 34. 2 Kent, 639. 1

Cr. & M. 743. 6 Term R. 258.

⁷ 24 Ill. 483. 4 Barn. & Ab. 52. 1 Hilton, 292.

⁸ 12 Cal. 301.

⁹ 23 Ind. 533.

¹⁰ 14 Wend. 201.

who is to make the payment becomes insolvent before the delivery of the property.¹

§ 604. A lien will also be waived where a factor voluntarily parts with the property, as by pledging it for his own debt, or suffering it to be attached. And, generally, it is waived where the person who is entitled to it, voluntarily parts with the possession of the goods, there being no fraud practiced upon him in procuring him to do so.² This rule has been held with great strictness. In a case where it was agreed that the owners of a saw-mill who sawed logs into boards, should permit them to be removed to a lot provided by the owner at a short distance, where they should remain subject to their lien until paid, and they were so removed, it was held that the lien was waived as to third persons, one of the court expressing the opinion that it might possibly have been enforced as between the parties.³ The lien is also waived where the person having it causes the property to be taken on an execution in his own favor.⁴ But if the delivery to a third person be merely for the benefit of a factor, and as a servant to the factor, with notice of the lien, the lien is not waived.⁵

§ 605. If a factor pledge the goods of his principal, the latter may recover the value of them in turn against the pawnee, on tendering to the factor what is due to him, without any tender to the pawnee, for the reason that a lien is a personal right and cannot be assigned.⁶ But a party having a lien may transfer the possession subject to the lien to a third person, who may lawfully hold the property until the lien is paid.⁷

§ 606. Parting with possession of a part of the property to which the lien attaches will not destroy it upon the remainder, provided the holder retains either actual or constructive possession; and in like manner, parting with the possession upon a condition which is not performed, will not waive it.⁸

§ 607. A mere trespasser or wrong doer, who gets possession of property without the consent of the owner, cannot, in general, deal with it so as to give a lien thereon as against the true owner; and generally, where one comes into possession of property without due authority, he cannot, except in the case of a tavern-keeper who has

¹ 2 Bosw. 489.

² 2 Kent, 639. 8 Pick. 73. 1 East, 4.
6 Hill, 43. 26 Wend. 467. 1 Car. & P.
575. 8 Iowa, 207.

³ 26 Wend. 467, 481.

⁴ 5 Bing. 130.

⁵ 2 Kent, 639.

⁶ 5 Term R. 604.

⁷ 19 Wend. 431. 1 Minn. 194.

⁸ 3 Maule & S. 169.

received beasts in good faith to take care of for his guests, maintain a lien upon them against their true owner. Thus a tradesman cannot claim a lien upon a chattel delivered to him by the owner's servant without the authority of his master; and one who has received, from a factor, his principal's goods upon a pledge, cannot retain them.¹

§ 608. As the holder of a lien is only entitled to detain the property under the lien, if he should sell it, the owner is remitted to his original rights discharged of the lien, and may reclaim it or bring his action against the bailee for its conversion.²

§ 609. Executors and administrators stand in the place of their testator or intestate, and may bring an action for taking, detaining or injuring his goods, or the goods which have come to their hands; and in like manner may the trustee of an express trust in New York.³ And where an action of trover was brought by an only son, entitled to succeed to his father's personal estate, for its conversion, although it was shown that no letters of administration had been granted, the action was sustained, it appearing that the defendant had, at several times, expressly admitted the right of the plaintiff, and had offered to give him the possession of the property.⁴

§ 610. In the action of trover, the holder of a lien who brought his action against the owner for the conversion of the property recovered as damages the amount of his lien. If he brought it against a stranger he recovered the value of the property, the surplus of which, above his lien, he held to the use of the owner.⁵ It remains to be determined whether the holder of a lien can, under the Code of Procedure (§ 113), recover against a stranger who has taken or detained the property, any more than the amount of his lien. The point does not seem to have been taken, as yet, in any case. The cases above cited simply refer to the old rule with approbation. One case⁶ holds that the rule, as between the holder of the lien and the general owner, is not changed by the Code.

§ 611. The action of trover might be brought where the plaintiff's goods had been converted, notwithstanding he had recovered them after the conversion, and in this case the recovery only operated

¹ 3 Atk. 44. 2 Str. 1187. 5 Term R. 604. 4 Esp. 174. 7 East, 5. 42 Barb. 623. 25 Wend. 653. ⁵ 7 Cowen, 670. 21 Wend. 301. 29 Barb. 522. 41 id. 471. 6 Bosw. 176. 23 N. Y., 494. 28 id. 585. 13 Minn. 291.

² 19 Wend. 431. See 1 Minn. 134.

³ 2 Bailey, 174. 1 Pick. 889. Code, § 113. The same rule of damages extends to

⁴ 7 Wend. 354. 13 id. 457.

⁶ 23 Barb. 240.

to mitigate the damages. Thus where a bailee of property used or disposed of it contrary to his agreement with the owner, as when he had hired his horse to go a certain distance and went beyond it, or when he hired it for a particular time and kept it over the time, the owner might bring his action for the conversion and recover his damages, as the use of the property contrary to his agreement was a conversion in law.¹

§ 612. A conversion is also implied, as a general rule, in all cases where one has received the goods of the plaintiff in any manner, and, without a right to detain them, refuses to deliver them to him upon request, with the single exception of a negotiable bill or note transferred before its maturity in the fair course of trade.²

§ 613. Mortgagees and pledgees have a special property in the subject of their mortgages or pledges. A mortgage is a sale of an article upon a condition that if the mortgager shall, within a certain time specified in the contract of sale, pay to the mortgagee a certain sum of money (then due, or, it may be, for future advances), or perform some specified service, the sale shall become void.³ Within this rule, a bill of sale, absolute on its face, but made under a cotemporaneous parol agreement to hold it as security for a certain debt, is a mortgage.⁴ If it is valid as to a part of the property embraced in it, it is not rendered void as to such property by reason of its professing to mortgage other property as to which it is inoperative.⁵ Property not yet in existence, actual or potential, cannot be sold or mortgaged; but that yet to be acquired and which will be the product of property which the mortgager then owns, may be mortgaged or sold. Within this rule the expected wool growing on sheep, or the crops, dairy and other products of a farm, may be sold or mortgaged.⁶ The rule is otherwise in Wisconsin.⁷ But a mortgage, not only of all the goods then in a store, but of those, also, which might thereafter be put therein, although good as to those then in the store, does not hold those thereafter put therein.⁸ And yet, if those goods are delivered by the mortgagee to the mortgager, he will hold them even against the claims of the person who had sold

¹ Bac. Ab. Trover, E. 5 Mass. 104.
Infra, §§ 622, 625.

² 6 Mod. 212. 7 John. 254, 257. 9 Wend. 167. 10 id. 389.

³ 11 Mich. 531. 1 Coms. 496. 35 N. Y. 274. 40 Barb. 180. 16 Ind. 380. 16 Iowa, 422. 35 Ill. 282.

⁴ 31 N. Y. 542.

⁵ 19 N. Y. 123. 17 id. 580.

⁶ 8 Barb. 111. 34 id. 10. 41 id. 404. Id. 610. 32 N. Y. 417. (See 20 Barb. 37.)

23 Ill. 320. 24 id. 17.

⁷ 7 Wis. 159. 10 id. 397.

⁸ 19 N. Y. 123.

them to the mortgager.¹ A personal mortgage need not be under seal, and may be executed by one partner for the firm.² It transfers the title subject only to be defeated by the performance of the condition, and after default in the condition the title of the mortgagee is absolute, and a tender of the money due will not reinvest the title in the mortgager.³ This is so, even if the mortgager still remains in possession,⁴ or the mortgagee takes the property without sale, or it is worth much more than the debt,⁵ and if the mortgager sells it to a *bona fide* purchaser, he acquires no title.⁶ If the mortgager sells it under the power of sale in the mortgage, he must account for the balance, if any, in his hands over the debt and expenses.⁷ The rule is not changed although the mortgage contained a power of sale, nor by the acceptance after forfeiture of part of the money due.⁸ The title still remains in the mortgagee and if he sells the property he can convey a good title to it, but if he should accept the whole sum due the title would reinvest in the mortgager,⁹ and if he sells a portion of the property for sufficient to pay his debt with the interest and expenses, the title of the residue reverts to the mortgager and a sale thereof by the mortgagee is wrongful.¹⁰ If he has sold stock or other things mortgaged, the debt is canceled to the extent of the avails of the sale.¹¹ The mortgager cannot pledge the property, or otherwise create a lien upon it to the prejudice of the mortgagee, even if the property be live animals and the lien is for their keeping.¹² The mortgage may contain a clause authorizing the mortgager to retain possession of the goods until it becomes due,¹³ but a clause or a separate agreement which authorizes the mortgager, not merely to remain in possession, but to sell and otherwise deal with the property as his own, renders the mortgage absolutely void.¹⁴ If, however, the property mortgaged is goods in a store, a clause allowing the mortgager to sell them for cash, only, which is to be paid to the mortgagee on the mortgage does not necessarily make the mortgage void, but raises a question for the jury,¹⁵ and that

¹ 40 Ohio N. S. 481. 11 Wis. 207. 29 Ill. 122.

² 5 Mich. 107.

³ 35 N. Y. 274. 22 id. 39. 4 Coms. 497. 39 Barb. 390. id. 608 and refs. 22 Ill. 546. 12 Wend. 61. 3 Denio, 33. 35 Cal. 404. See 21 Wis. 427 for the rule there.

⁴ 39 Barb. 608-9 and refs.

⁵ 3 Denio, 33. 40 Barb. 189.

⁶ 39 N. Y. 441.

⁷ 12 Wis. 410. 3 Denio, 33.

⁸ 12 Wend. 61. 3 Denio, 33.

⁹ 2 Denio, 170. 3 id. 33. 6 Paige, 583.

¹⁰ 3 Denio, 33. 11 Iowa, 285.

¹¹ 5 Mich. 423.

¹² 28 N. Y. 252.

¹³ 1 Kern. 501. 17 N. Y. 202. 34 id. 253.

¹⁴ 5 Seld. 213. 3 Kern. 577. 19 N. Y. 123. 5 Transcript, 52; but see 22 Ill. 377. 7 Mich. 108. Id. 519.

¹⁵ 24 N. Y. 359. 17 Iowa, 89.

money, as against the creditors of the mortgager, must be applied to reduce the mortgage, whether it is in fact paid over or not.¹ If the mortgage is payable on demand, a special demand must be made before the mortgage is due or the property vests in the mortgagee.² If it is void as to a part of the property, it is wholly void.³

§ 614. As we have seen, a mortgage does not necessarily require a delivery of the property mortgaged,⁴ and as between the mortgager and mortgagee it may be made by parol.⁵ But where there is not an actual delivery and continued possession by the mortgagee, it is, by statute, void, as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy, be filed and entered in accordance with its provisions. These require that it shall be filed in the several towns or cities where the mortgager resides; in the city of New York in the register's office; in the other cities and towns in which a county clerk's office is kept, in such office, and in towns where a county clerk's office is not kept, in the town clerk's office. The lien of the mortgage so filed will cease as against the creditors of the mortgager and purchasers in good faith or subsequent mortgagees, at the end of one year from the time of filing, unless, within thirty days next preceding the expiration of the year, a true copy, together with a statement exhibiting the interest of the mortgagee in the property claimed by virtue thereof, shall again be filed in the office of the register or clerk of the city or town where the mortgager shall then reside.⁶ While, under this statute, a literal copy is not necessary, it not being an objection that it is made on a differently printed blank, but the variance not affecting any substantial provision;⁷ yet, where it is otherwise, as where the amount secured was made \$100 too much in the copy, the mistake is fatal.⁸ It is enough that the filing is in the town where the mortgager resided at the execution of the mortgage, though he has changed his residence when it is filed.⁹ If the mortgager has left the State in the meantime, the provision as to refiling cannot be complied with, and a *bona fide* purchaser of the goods, after the expiration of the year, acquires a title superior to the lien of the mortgage.¹⁰ If several mortgages are given, at different times, to different creditors upon the same

¹ 28 N. Y. 360.

² 19 N. Y. 498.

³ 5 Transcript, 52.

⁴ Ante § 613. 5 John. 258.

⁵ 9 Wend. 345.

⁶ Laws of 1833, ch. 279; also id. of 1849, ch. 69. 3 R. S. (Banks' 5th ed.) 223, 224.

⁷ 16 Barb. 46.

⁸ 19 N. Y. 496.

⁹ 17 Barb. 523.

¹⁰ 37 N. Y. 198.

property, to secure antecedent debts, and neither is filed in the proper office, the one first given has the priority. The omission to refile a chattel mortgage does not render it invalid as against purchasers or mortgagees intermediate the original filing, and the time when there should have been a refiling, even where the chattels remain in the mortgager's possession.¹ The refiling is as nugatory, if made before the commencement of the thirty days, as if made after that time, and this refiling must be continued from year to year.² The statement accompanying them must be made by the mortgagee or his attorney,³ and is not sufficient if it says merely "Refiled and renewed;" a full statement, as required by the statute, is necessary.⁴ If a mortgage is duly filed, and within a year the property is unlawfully converted by a third person, the mortgagee may bring an action therefor after the year, and although he has not refiled his mortgage.⁵ When the office of clerk is vacant, or he is absent, it is sufficient if a person in charge of the office receives it, files it and places it among the other personal mortgages in the office;⁶ and if left at the proper place, a neglect to file or index it, or an error in endorsing it on the part of the clerk, by which a subsequent purchaser is misled, will not prejudice the rights of the mortgagee.⁷

§ 615. The omission to file a mortgage of chattels can only be taken advantage of by a creditor, or by a purchaser, or a subsequent mortgagee in good faith. By a creditor is meant a judgment creditor with an execution against the mortgager.⁸ A purchaser or subsequent mortgagee in good faith is one who purchases, or takes a mortgage for a fresh consideration, and without notice of the original mortgage.⁹ It is not sufficient that it is taken for a precedent debt.¹⁰ If a personal mortgage is not filed till after an execution is issued, it is void as against the officer holding the execution, although the mortgage is filed before a levy is made.¹¹

[§ 615*a*.] The last two sections are based on the general rules of law, and the statutes of New York, and do not cover cases in other states, except as they are like those of New York, and are above

¹ 4 Kern, 71. 30 Barb. 485. 35 id. 38.

² 44 Barb. 258. 2 Sand. 299.

³ 44 Barb. 258.

⁴ 1 Denio, 163.

⁵ 28 N. Y. 585. 23 id. 539.

⁶ 13 Barb. 326. 18 id. 194.

⁷ 18 Barb. 194. 1 Daly, 489. 1 Abb. 446.

N. S. 32. 4 How. Pr. R. 16.

⁸ 25 Wend. 396. 17 N. Y. 580. 37 Barb. 571.

⁹ 19 Wend. 514. 20 id. 17. 3 Kern. 556. 28 N. Y. 272. 3 Mich. 123. 9 Iowa, 83. 14 Ohio N. S. 488.

¹⁰ 17 N. Y. 580. 27 id. 581. 17 Barb.

¹¹ 40 N. Y. 98.

referred to. It is impossible, in a work like this, to go further into detail on this subject.

§ 616. A *pledge* or *pawn* is the deposit of an article with a creditor for the security of the debt of the pledger. Unlike a mortgage, it confers only a special property on the pledgee, and his right depends entirely upon the possession of the thing pledged. It must be given as a security for a debt or engagement, but it may be for the debt or engagement of the pledger, or of another person, and, unless by special agreement to the contrary, will be regarded as a security for the entire debt of the pledger, and cannot be redeemed by a partial payment.¹ If a mortgage is so pledged, the pledger may afterward assign it, and the assignee may enforce it by a sale of the goods, but subject to the lien of the pledgee.² Property exempt from execution may be pledged.³ One joint owner cannot pledge the joint property for his own debt, although he was in possession of it at the time, and the pledgee did not know of the joint ownership.⁴

§ 617. As possession and delivery is necessary, nothing of which the pledger cannot give immediate possession can be pledged.⁵ This possession may, however, be according to the nature of the thing pledged, as by a written transfer of shares in an incorporated company. One may, therefore, pledge money, negotiable instruments, real estate mortgages, bonds, title deeds, choses in action, &c., &c.⁶ And, also, where one has a limited title to anything, he may pledge it to the extent of his title.⁷ And an owner of property may, by special leave, permit any third party to pledge it for a particular purpose.⁸ If promissory notes are pledged, the pledgee may enforce their collection by suit, recovering the whole amount, and being responsible to the pledger for the balance remaining after the payment of the debt secured thereby.⁹

§ 618. Upon failure of the condition upon which the pledge is held, the pledgee may sell it and apply the proceeds of the sale in liquidation of his demand, and its interest, if any, and necessary expenses.¹⁰ But that sale cannot be made until the pledgee has

¹ Story on Con. § 425 (ed. of 1844).
Id. on Bail. §§ 286, 287, 300, 301, &c. 4
Barb. 491. 2 Kent, 577. 1 Robert. 160.
30 Cal. 372. 34 id. 125.

² 1 Robert. 160.

³ 3 Ohio N. S. 270.

⁴ 24 Iowa, 375.

⁵ Story on Bail. § 297. 8 Iowa, 207.

⁶ 2 Kent, 577. 2 Coms. 443. 2 Buls.
306. 16 N. Y. 392. 9 Bosw. 322. Story

on Con. § 427 (ed. of 1844). Id. on Bail.
§§ 287, 290, 297. 8 Iowa, 207.

⁷ 2 Term R. 376. Story on Con. § 426.
Id. on Bail. § 295.

⁸ Story on Con. § 325 (ed. of 1844). 13
Mass. 105.

⁹ 5 Bosw. 178. Id. 429. 7 Wis. 492.

¹⁰ Story on Bail. § 306, &c. Id. on Con.
(ed. of 1844) § 430.

called on the debtor to redeem the pledge in a reasonable time, and given him notice of the time and place of sale, which must be public. If he cannot be found for this purpose, the pledgee may resort to a suit to foreclose the pledge, or, in New York, to the remedy given by the Laws of 1869, of which a copy is given; *ante*, page 11.¹ A single exception to this rule exists in the case of a pledge of commercial paper, which the pledgee cannot sell, but must collect as it becomes due, and apply the avails in payment of his debt.² The parties may agree that the sale may be at public or private sale without notice. But, if the agreement is merely that the pledgee may sell at public or private sale, he cannot sell at private sale without making the demand.³ The pledgee cannot become the purchaser himself, and so long as the property remains in his hands, whether before or after forfeiture, it is subject to redemption by the pledger paying the debt and all the expenses incurred in its custody,⁴ which is the only means by which he can regain the property.⁵ The pledgee may, if the use of the pledge be necessary or beneficial, use it to indemnify himself for its expenses, as, if a horse be pledged, he may ride or drive it moderately. If, however, the use be injurious to the pledge he must not use it; and if it is attended with risk, he is responsible for the injury it may receive.⁶ A creditor may assign his claim to a third person, and with it any pledge he holds for its payment.⁷ If he dies before the pledge is redeemed, it passes to his representatives.⁸ A tender of the amount due destroys the lien of the pledge.⁹ When the debt is paid, the pledgee must account for all the profits he has derived from the property.¹⁰

§ 619. Where two persons together own any personal property, they hold it either as *joint tenants* or as *tenants in common*. They are joint tenants when they acquire their title at the *same time*, by the *same conveyance*, each taking the *same interest*, and each holding by the *same undivided possession*. The quantity or proportions of the interest may be different, but its *kind* must be the same. Thus one may hold one-third and another two-thirds, but one may not hold a right to the use of the property for one year and the other the

¹ 4 Denio, 227. 2 Coms. 448. 16 N. Y. 392. 45 Barb. 560. 10 Bosw. 325. 8 Cal. 151. 8 id. 145. 34 id. 125. 9 Wis. 348. 11 Iowa, 410. 26 Ind. 108.

² 16 N. Y. 392.

³ 27 N. Y. 364. 45 Barb. 560. 10 Bosw. 325. Story on Bail. § 317. 12 Wis. 413.

⁴ Story on Bail. § 319.

⁵ 34 Ill. 508.

⁶ Story on Con. (ed. of 1844), § 432. Id. on Bail. § 329, &c. 2 Kent, 578.

⁷ 31 N. Y. 75.

⁸ 32 Ill. 508.

⁹ 1 Robert. 160.

¹⁰ 29 Cal. 14.

remainder. Tenants in common are those where the possession is undivided, but all, or any of the other requisites to a joint tenancy are wanting.¹ A letting of a farm on shares creates a tenancy in common in the crops or other products to be divided.² And so, if the one so taking land employs a third person to thresh the crop for a certain share, all the parties are tenants in common of the crop.³ The same rule applies to a leasing, in the same manner, of any other property, as a mill.⁴ In a joint tenancy on the death of one tenant his right vests in the surviving tenant or tenants. In a tenancy in common it does not, but belongs to the estate of the deceased tenant.⁵ Property held by partners, whether goods or rights in action, is held in joint tenancy.⁶

The New York Revised Statutes provide that estates granted or devised to two or more shall be held to be tenancies in common, unless expressly declared to be joint tenancies.⁷ This does not apply to personal property.⁸ If bills of sale or personal mortgages are simultaneously given of the same property, one to each of two vendees, each having notice of the transaction with the owner, they are tenants in common.⁹ If a tree grows on a boundary line, so that the line divides the trunk, it belongs to the adjoining proprietors as tenants in common. But if the trunk of the tree is on one side of the line, it is the property of him on whose side it is, though the roots extend to the other side.¹⁰

§ 620. In joint tenancies and tenancies in common, each tenant is entitled to the possession of the property, and neither of them can dispossess the other so long as it remains undivided; and, where they own lands, neither can maintain an action against the other for the deeds, leases or other papers in relation to it.¹¹ And at common law neither could maintain trover against the other for his share of the property unless he had lost, sold or destroyed it,¹² or done some act inconsistent with the nature of the co-tenancy, and which, in the common course of things, would destroy the other's interest in it,¹³ as

¹ 4 Kent, 357. 2 Bl. Com. 180, &c., 191, &c., and 399. 14 Wend. 265.

⁴ 4 Bradf. 308.

⁹ 12 Wis. 243.

² 1 Hill, 234. 15 Barb. 595. 44 id. 428. 34 Ala. 167. 17 Cal. 541. 19 id. 617.

¹⁰ 25 N. Y. 123, and refs.

¹¹ 12 John. 484. 7 Wend. 449. 3 Kern. 173. 1 E. D. Smith, 215. 4 Wis. 554.

³ 15 Barb. 333.

¹² 3 John. 175, 178. 15 id. 179. 7

⁶ 1 Wend. 380.

⁵ 2 Bl. Com. 180 to 187, and 191 to 195, and 399. 4 Kent, 360.

Wend. 354, 357, 449. 9 id. 338. 8 Barb. 585. 28 Ill. 314. 1 Oregon, 173. 13 Minn. 82.

⁸ Collyer on Part. § 123. 2 Kent, 350.

⁷ Vol. 1, p. 727, § 44. 3 id. (Banks' 5th ed.) 14.

¹³ Cooke, 53. 1 Chip. 242.

where one had taken the animals of another to fatten on shares, and took what he claimed to be his own share, after notifying the other party to come and get his part, and turned the others astray,¹ or property owned in common, consisting of shingle mills, &c., was removed by one co-tenant from the building where it had been used in the manufacture of lumber, and put into a building of his own, several miles distant, and used in the manufacture of his own lumber.² But one tenant may dispose of his own interest therein.³ And one of several tenants in common cannot maintain an action against another for the destruction of the common property by the mere negligence of the latter.⁴ If the property owned in common is in its nature severable, in common bulk, and of the same quality, like wheat or other grain, each tenant may sever and appropriate his share, if it can be determined by measurement or weight, without the consent of the others, and sell or destroy it without being liable to them for the conversion of the common property.⁵ But, in the case of property not so severable, as animals, or other property where the quality and value of one article or portion are different from that of other articles or portions, and each possesses a distinct and obvious identity, the rule is otherwise, and such a severance and appropriation would be a conversion.⁶

§ 621. The words "personal property," in the Code of Procedure, including "money, goods, chattels, things in action and evidences of debt,"⁷ all actions for taking, detaining or injuring either of them, are within the jurisdiction of a justice of the peace, if the damages claimed do not exceed two hundred dollars,⁸ and the action may be brought against any one who has done it, whether it be one who first unlawfully took the property, or having become possessed of it, unlawfully detains it, or one who either ignorantly or knowingly received it from one not having the right to dispose of it, and detains or injures it.⁹

§ 622. Where the action is for unlawfully taking the property, and it has not been recovered by the plaintiff, the measure of damages would be its value; but if it has been received again by the plaintiff, or tendered to him, his damages would be the actual loss the taking had occasioned him.¹⁰ Where it is for the detention, the value of

¹ 4 Wend. 525.

² 31 Barb. 569.

³ 8 Cal. 51. 24 Iowa, 375.

⁴ 1 Sand. 304.

⁵ 15 Barb. 333. 22 id. 568. See 37 How. Pr. R. 88.

⁶ 15 Barb. 336.

⁷ Code, § 463.

⁸ Id. § 53.

⁹ *Infra*, § 625.

¹⁰ 6 Mod. 212. 10 John. 172, 176. 23 Wend. 495, 496. 24 N. Y. 359. *Supra*, § 611. *Infra*, § 1528 a. 5 Cal. 327. 26 Ill. 477. See 17 Wend. 93.

the property detained would be the measure of damages, and if this is recovered, in analogy to the rule in the action of trover, on satisfaction of the judgment, the title would vest in the defendant.¹ As a general rule the value is the market value of the property when wrongfully taken, to which interest may, generally, be added.²

§ 623. Where an action of trover was brought for a negotiable promissory note, or bill of exchange, it was necessary for the plaintiff to prove, not only that he was once its owner, and that the defendant had converted it, but he must also show that the defendant came by unfairly, or out of the usual course of trade, without paying value for it, or under circumstances to induce suspicion that the person transferring it had no right to do it.³ This was different from the general rule in trover, which only required the plaintiff to prove his ownership and the defendant's conversion, leaving the latter to defend by showing the title out of the plaintiff. The reason of the distinction still exists, and would seem to warrant the same rule where an action is brought for the detention of a bill or note.

§ 624. Where one delivers a note to his creditor to collect it and apply the proceeds upon his debt, the title passes to him and precludes an action for its detention.⁴ And where one has paid his note and the creditor refuses to deliver it, an action at law will not lie for its detention, as the note, having been paid, is valueless, and indeed it may sometimes belong to the creditor as a memorandum.⁵

§ 625. In trover any wrongful act, by which the defendant has deprived the plaintiff of his property, or assumes a right to dispose of, or control it in defiance of the plaintiff's rights, whether for his own or another's use, is a conversion.⁶ A wrongful intent is not necessary. It is enough if the owner has been deprived of his property by some unauthorized act of another.⁷ Accordingly, if a man buys a stolen horse, at public auction, and then sells it, in ignorance of the facts, and in good faith, he is liable to the owner, without a demand.⁸ A mere negligence, or delay, as of a forwarder to forward goods, is not enough.⁹ Trover will lie against a trespasser for cutting

¹ 2 Str. 1078. 6 John. 168. 31 N. Y. 311. 31 N. Y. 490. 34 id. 463. 2 Code R. 31, 210. Supra, 583. 32. 3 Mich. 139. 12 id. 328. 23 Ind.

² 4 Duer, 481. 26 Barb. 648.

³ 2 Camp. 5. Ante, §§ 380, 388.

⁴ 12 John. 347.

⁵ 3 John. 492. See 3 Sel. 486.

⁶ 7 John. 254. 10 id. 172. 15 id. 431.

5 Cowen, 323. 9 Wend. 167. 23 id. 462. 180.

311. See 2 Cal. 571.

⁷ 31 N. Y. 490. 9 Iowa, 589. 23 Ind. 311.

⁸ 23 Ind. 311.

⁹ 28 Barb. 515. 2 Cal. 571. 11 Wis.

timber, as soon as it is cut.¹ It is not a conversion that an agent to sell at a certain price sells for a less sum, but a mere breach of duty.² But it is a conversion for an agent to disregard orders in regard to the disposition of property; as where a warehouseman was ordered to send flour forward by a certain railroad, but he shipped it, instead, in a propeller, whereby it was lost.³ And so where an agent had A's money in his hands, to be loaned in A's name, but he loaned it in his own name, and for his own use and benefit.⁴ An unlawful taking is of itself a conversion, and so is an unauthorized levy on property by a sheriff, who has made an inventory and declared his intention to sell;⁵ and even a mere levy by an officer who does not remove the property, and, before action, waives it, amounts to a conversion.⁶ But if an officer merely obeys the command of a writ by taking the property described in it, as directed, he is not liable in trover.⁷ Where the property came lawfully into the defendant's possession, a sale or destruction of it, or any abuse of the property or use of it beyond the purpose for which he held it of the bailor is an actual conversion. Thus one who hires the plaintiff's horse to go a certain distance, and goes to another place with it, or who without authority or excuse keeps it beyond the time it was delivered to him, is held to have converted it.⁸ So if a bailee sets up title in a third person, as an excuse for not delivering the goods to the bailor.⁹ It is otherwise as to a common carrier, who may set up the right of the true owner in all cases where he either delivered the property to him on demand, or it has been taken by legal process.¹⁰ If a man takes my goods unlawfully, this is, in itself, a conversion, for which an action lies immediately, without a demand. So, if he knowingly buys them of a person unauthorized to sell them.¹¹ And so, if he receive them lawfully, as by delivery, finding, or bailment, but sell, destroy, or otherwise convert them. And where an actual conversion is shown, a demand and refusal are never necessary.¹² But in all

¹ 4 Cal. 184.

² 33 Barb. 246.

³ 14 Wis. 5.

⁴ 7 Minn. 477. See 31 N. Y. 490.

⁵ 7 Cowen, 735. 23 Wend. 466. 6 Iowa, 92.

⁶ 14 Wend. 201, in connection with 23 id. 495, &c. 5 Denio, 198. 4 Kern. 278, 279.

⁷ 4 Wis. 803.

⁸ Supra, § 611. Bac. Ab. Trover, (E.)

5 Mass. 104. 5 Duer, 49. 4 E. D. Smith, 397. 5 Minn. 486. 5 Ind. 146. Id. 220.

⁹ 34 N. Y. 463. 51 Barb. 212.

¹⁰ 36 N. Y. 403, and refs. Supra, § 126.

¹¹ 25 Iowa, 56.

¹² 3 Wend. 406. 10 id. 389. 21 id. 72. 2 E. D. Smith, 121, 352. 1 Keyes, 468. 9 Barb. 176. 1 Bosw. 557. 12 Cal. 483. 23 id. 359. 6 Iowa, 92. 2 id. 580. 9 id. 589. 23 Ind. 311. 42 Ill. 34. 4 Nevada, 404.

other cases, where the plaintiff has lawfully or without wrongful act obtained its possession, the owner is required to demand the property of the defendant, and then if he refuses to deliver it, his refusal is evidence of a conversion, or if he promises to deliver and neglects to do so, his neglect is.¹

There is, however, one distinction to be observed, and that is, where one comes wrongfully into the possession of property, and therefore is liable without a demand, if he passes the same to an innocent person, a demand must be made of such person.²

§ 626. A demand and refusal, does not, however, constitute a conversion, but only furnishes evidence of it, which may be repelled by proof showing a good excuse for non-compliance with it.³ Thus, if the compliance with the demand was impossible, or impossible at the time, as when the demand was made at a different place from the one where the property was deposited, and the defendant replied that he was willing to deliver it at the proper place;⁴ or if he refused to deliver a stick of timber lying on his land, but at the time declared he laid no claim to it, and did not intermeddle with it;⁵ or if he refused to deliver goods that he had found until it should be shown him that the person demanding them was the owner,⁶ the refusal is no evidence of conversion. In order to make the refusal *prima facie* evidence, it should appear that the property was present at the time the demand was made, or under the undisputed control of the defendant, and that he refused to deliver it. And then the defendant may show the excuse for not complying with the demand.⁷ And where one who had come lawfully into possession of the property refused to deliver it, but afterward, before the commencement of the action tendered it to the plaintiff, the action was defeated.⁸ If the defendant has claimed the ownership and possession, an actual possession is not necessary before he can be charged by the true owner.⁹

¹ 6 Mod. 212. 7 John. 254. 10 id. 172. ⁵ 2 Mod. 245. 2 Buls. 310.
⁹ Wend. 167. 10 id. 389. 3 Hill, 350. ⁶ 1 Esp. 83. 2 Mason, 77, 80, 81. 2 E.
 3 Coms. 508. 30 Barb. 278. 5 Minn. D. Smith, 157. 23 Wend. 462. ⁷

486. ⁷ 5 Hill, 455. 32 Barb. 396. 6 id. 436.
² 1 Keyes, 468. 26 Barb. 167, and refs. 24 id. 528. 30 id. 276. 2 E. D. Smith,
 10 Ind. 375; but see 4 Nevada, 494, 474. 14 Cal. 250.
 contra.

³ 1 Cowen, 322. 1 Coms. 522. 30 Barb. ⁸ 1 Moore & Scott, 459. This case is
 276. 2 E. D. Smith, 336. 5 Bosw. 293. cited with approbation, 5 Bosw. 311;
 See 1 Keyes, 321. 42 Ill. 324. but see ante, § 625, note 6; also §§ 611,
 622, note 10.

⁴ 2 Denio, 643.

⁹ 28 N. Y. 454.

§ 627. Where property was in possession of *partners*, a demand of it from one of them and the refusal, was sufficient to maintain an action against all the partners.¹ But where it was in the hands of co-tenants, not partners, a refusal by one to deliver it, was not evidence of conversion by both.² And the refusal of a servant to deliver goods intrusted to him by his master because he has no authority from his master, will not furnish evidence of a conversion by his master, although it appear that his master subsequently approved his conduct.³ If in the hands of two persons who have a joint possession thereof, the refusal of one is sufficient.⁴

§ 628. As we have seen, where any one came lawfully into possession of property, there is no conversion of it until some wrongful act is shown, or there is a refusal or neglect, without excuse, to deliver it to the owner upon demand. And until such conversion, the owner may sell the property in the defendant's possession, and then the purchaser, upon demand and refusal, may bring trover in his own name. And indeed, even after an actual conversion, it seems the owner might have deemed the property still in the bailee's hands and demand it, and use the refusal to deliver as evidence of conversion.⁵

§ 629. A very slight agency or interference is sufficient to render one liable for the conversion. Thus, where the owner of a building, who could not speak English, was present with his son, who acted as his interpreter, in which building some machinery was set up belonging to the plaintiff, and the son forbade the plaintiff to remove the machinery, both were held liable for the conversion.⁶

§ 630. The abolition of the action of trover, in New York, has not varied the rights of parties who might formerly resort to it for relief. The Code of Procedure provides that "all rights of action given or secured by existing laws, may be prosecuted in the manner provided"⁷ by it, and the provision extending to every case which was remediable by the action, all of them will be comprehended within the expression "taking or detaining" personal property.

§ 631. In all cases where one either willfully or negligently inflicts an injury upon the property of another, or where it is injured in consequence of a wrongful or negligent act of another, the person by whose act or negligence it is occasioned is liable in damages. In the

¹ 24 Wend. 169, 178. 4 Hill, 15.

² 1 Cowen, 322. 4 Hill, 13.

³ 5 Hill, 455. 40 Barb. 638.

⁴ 3 E. D. Smith, 555.

⁵ *Infra*, § 742. 2 Coms. 293. 2 Kern. 622. 38 N. Y. 206.

⁶ 5 Denio, 527.

⁷ Code of Procedure, § 468.

case of *direct* acts, the liability extends to all who have contributed to the injury, and in the case of consequential injuries, to all parties or their servants or agents whose negligence has occasioned them. The extent of one's liability for the consequences of a wrongful act is illustrated in a case where a defendant, with a deadly weapon, pursued a boy, with whom he had quarreled, into the plaintiff's store, and the boy, to escape him, ran against a wine cask and spilled the wine. It was held that the defendant was liable for the damages.¹

§ 632. The rules governing the rights of parties in these cases, are in most respects identical with those which exist in relation to injuries to the person or to real estate. Thus, where one shoots off a gun, by which the plaintiff's horse is frightened and runs away with his carriage and breaks it, or where his servant, in a dark night, drives his carriage on the wrong side of the highway, and thereby unintentionally runs against and destroys the plaintiff's carriage, he is liable.² So he is liable where by careless and reckless driving in the highway he frightens a horse, hitched to a buggy, by the roadside, causing him to run away and do damage to the buggy.³

§ 633. Under the rules referred to in the last section, one is liable for injuries done by himself or his servants, or domestic animals, to the plaintiff's property, under the same circumstances which would render him liable for an injury committed by them to the person, and subject to the same exemptions from liability.⁴ But, as in the other case, the plaintiff must not, by his own or his servant's negligence, contribute to it, and if he does, in the slightest degree, he is without remedy except for a willful injury. Where, therefore, the plaintiff's cow was killed by drinking maple syrup, carelessly left by the defendant in his uninclosed land, it was held that he could not recover, because it was by his own negligence that the cow was there.⁵ So, where the defendant dug a pit in a common, and the plaintiff's mare, straying there, fell into it and was killed, it was held that as the plaintiff had not shown a right to have his mare on the common, the digging of the pit was not unlawful against him, and no action lay. It would have been otherwise if it had been dug in the highway.⁶

¹ 4 Denio, 464.

² 1 Camp. 497. 10 Bing. 112.

³ 16 Ind. 312.

⁴ Ante §§ 481, &c. 21 Wend. 188. 19 id. 399. 5 Denio, 255. 13 John. 339.

E. D. Smith, 271. 15 Wis. 598.

⁵ 1 Cowen, 78. Also same principle,

2 Hall, 151. 4 Coms. 353. 22 Ind. 26.

18 Cal. 351.

⁶ Cro. Jac. 158, 9. Rolle's Ab. 88. Co. 1 Lit. 56, a

If there is a custom to let domestic animals roam on uninclosed commons, it is not negligence to allow a horse so to roam.¹

§ 634. A turnpike company is responsible for accidents to travelers, arising from the want of ordinary care in the construction or preservation of a bridge;² a railroad company for an injury suffered in consequence of its want of proper care in the transportation of the property intrusted to it for carriage, or for an injury to a person crossing its track, occasioned by the negligence of its servants,³ but not for carelessly running over cattle straying upon its track.⁴ This general subject is fully treated *ante* §§ 481, &c. In addition to what is there said, we add the following: The degree of care which a person shall exercise, to avoid injury by another, depends upon the circumstances of each case. One crossing a railroad track, should exercise more care than in crossing an ordinary highway.⁵ On the other hand, the company must take more care of a sick passenger, or an aged one, or a child, than of one in health and under no disability.⁶ It is not imprudent for a person to act upon the presumption that another, in his conduct will act in accordance with the rights and duties of both, even though such other has once conducted himself in a contrary manner.⁷ While a common carrier, ordinarily, is not liable for an injury caused by the act of God, yet, if he has departed from the line of his duty, and in consequence of that fault, property is injured by an act of God which would not otherwise have produced the injury, he is liable.⁸ As in said *ante* § 37*a*, a railroad company may make a contract with a passenger carried on its road, gratuitously, for even the gross negligence of its agents and servants.⁹ And this rule is probably the same in any case where the passenger assumes the risk, in consideration of any reduction in the rate of fare.¹⁰ The same rule applies, in New York, to contracts for the transportation of goods, though not in some of the other states.¹¹ A person who obtrudes himself upon a locomotive or cars, cannot recover if he sustains injury.¹²

[§ 634*a*.] As has been seen, a very rigid rule is held against railroads as common carriers.¹³ In regard to stage coaches, as the danger to be apprehended of inflicting injury upon others by them is less

¹ 12 Cal. 535.

² 6 John. 90.

³ 5 Barb. 337.

⁴ 5 Denio, 255.

⁵ 29 N. Y. 815.

⁶ 36 N. Y. 39. 26 Ill. 255.

⁷ 29 N. Y. 383.

⁸ 30 N. Y. 564.

⁹ See also 43 Barb. 105, &c.

¹⁰ 25 N. Y. 442. 24 id. 181. Id. 222. 43 Barb. 102.

¹¹ 43 Barb. 102. *Ante*, § 106*a*.

¹² 22 Ill. 633.

¹³ *Ante*, § 105, sub. 8.

than by railroad trains, the rule is somewhat relaxed.¹ It is accordingly held that their proprietors are not bound to use the greatest precautions of which the human mind is capable, but must use the highest practicable degree of care and diligence under the circumstances of the case.² Injuries caused by a drunken driver may be recovered for against them, and exemplary damages allowed.³

§ 635. In the case of a collision of canal boats or vessels upon a navigable river, if both parties are in fault neither can maintain an action for damages. If the collision is owing in part to negligence on the part of the plaintiff, a recovery cannot be had without showing a gross negligence on the part of the defendant, amounting to a wanton disregard of the other's rights.⁴ Thus where a boat lying in the canal near a lock, was run against and sunk by another approaching it at a time when there was not sufficient water to permit the latter to pass, although other boats had passed, it was held that her captain was bound to know that an attempt to pass was hazardous, and to act with necessary caution in approaching it.⁵ So where the plaintiff's barge was run down by another vessel, if it appear that the accident happened from circumstances which persons of competent skill could not guard against, or if the barge had been so placed, that persons using ordinary care would have run into it, or if but from some want of care of the plaintiff's servants the injury would not have occurred, the plaintiff cannot recover.⁶ Where a collision takes place between a vessel sailing on a wind and a steamboat, the question whether the officers of the steamboat were guilty of negligence in not using the greater power which they possessed of controlling their vessel was held to be the governing one.⁷

§ 636. Each person has a right to the use and disposition of his own property in a reasonable manner, but he is bound so to use it as not to injure his neighbors. For example, he may keep fire in his own house or burn over his fallow ground, but if he or his servants so carelessly keep fire in his house that it burns down and communicates the fire to his neighbor's which is also destroyed, or if he or his servant sets fire to his fallow in a dangerous, or dry or windy time, or does not take proper care of it, and it spreads and burns his neigh-

¹ 20 N. Y. 75 and refs. See 2 Kern. 425. 3 id. 9.

² 23 Ill. 357. 4 Iowa, 547.

³ 4 Greene (Iowa) 555.

⁴ 19 Wend. 399. See, as to this general subject, ante § 482.

⁵ 8 Wend. 469.

⁶ 4 Car. & P. 106.

⁷ 2 Wend. 452.

bor's barn or crop, he is liable for the injury.¹ But if the fire broke out without his neglect, he is not responsible,² as where one sets fire to log heaps on his own premises, and the wind rises, carrying the fire, without negligence on his part, on to those adjoining, where buildings and their contents are destroyed;³ and so, if a person who has a right to go into a chamber does so with a lighted candle, and sets it on fire without being guilty of any wrong or negligence, he is not liable.⁴ For the same reason, and under the general rule stated at the commencement of this section, the simply turning one's own sheep, having an infectious disease, into his own lot, which adjoins the lot of another occupied by sheep, will not render him liable to such adjoining owner for damages sustained in consequence of the disease having been communicated to his sheep.⁵

§ 637. The case of a bailee abusing his trust in such a manner as to render him liable for the taking or detention of the property bailed to him has been referred to.⁶ Where a bailee commits any wrongful act toward the property, the owner is not confined to his remedy upon the contract of bailment but may bring his action for the wrongful act or negligence. Thus, where one deposited his tools in another's house, and they were detained by the bailee for two months after request, by which means the bailor lost their use, he may maintain an action for them.⁷ So where he improperly use the thing bailed,⁸ or uses it in a manner contrary to the agreement under which it was bailed; as when a person hires a horse to go a certain distance, and goes beyond it.⁹

§ 638. Although, in general, they have no fixed or general market value, a man has such an ownership in a dog, cat or any wild animal which he has acquired a property in by possession, that he may recover damages for any injury to it.¹⁰ Thus, if the defendant set traps baited with flesh in his own ground so near where the plaintiff's dogs are kept, or where they pass upon the highway, that without trespassing upon his land, they must probably be attracted by the scent into the traps and be injured, an action will lie.¹¹ Any one,

¹ Comyn's R. 32. 8 John. 421. 25 N.

346. 23 Barb. 620. 8 Wis. 255. '16 Ark.

308. 4 Iowa, 506. 1 id. 108. 3 id. 81.

² 1 Bl. Com. 431. 1 Noy's Max. c. 44.

8 John. 421-2.

³ 44 Barb. 424.

⁴ 37 Barb. 15.

⁵ 41 Barb. 329.

⁶ Ante §§ 101 to 107.

⁷ Buller's N. P. 78.

⁸ 16 John. 76. Rolle's Ab. 5. Lev. 224.

Cro. Eliz. 219.

⁹ 5 Mass. 104.

¹⁰ Ante, § 563. 3 Term R. 37. 3 Bl. Com. 153. 52 Barb. 15.

¹¹ 9 East, 277.

however, may kill a ferocious and dangerous animal which is at large and a terror to the neighborhood,¹ or one which is in the habit of howling around his house at night so as to be a nuisance to his family, if the owner, after a reasonable notice, will not take care of it.² He may also kill a dog found chasing a fowl, or useful or reclaimed animal if necessary to preserve it, even if the animal pursued do not belong to him; and it is a question of fact for the justice or jury to decide whether the killing was of necessity.³ But these rules are not applicable to the case of one dog attacking another, where no action can be maintained even if one is killed, unless it is shown that the one that was injured was not in the wrong,⁴ or that the one that made the attack has the vicious habit of attacking and biting other dogs, without being incited to do so, and that to his owner's knowledge.⁵ A man may drive from his fields an animal trespassing thereon, by any of the ordinary means to which a prudent man may resort. He may use a dog for the purpose of driving off cattle, and is not liable for any injury thereby occasioned, unless there is something in the size, character and habits of the dog, or in the mode of setting him on or pursuing, which negatives the idea of ordinary prudence.⁶ He must not set a fierce mastiff upon the animal or animals when an inoffensive cur would suffice.⁷ He may turn them out of his lot; but if he also then drives them so far away that one strays away and is lost, he would be liable.⁸ So one may not poison, or otherwise kill geese or other domestic animals that he finds trespassing upon him.⁹ If one turns cattle out of his inclosure on to a public common, he is not liable for their starvation if their owner was notified by any one to take care of them.¹⁰

§ 639. It is provided by statute in New York that "any person may kill any dog which he shall see chasing, worrying or wounding any sheep unless the same shall be done by the direction or permission of the owner of the sheep or his servant," and that "the owner or possessor of every dog to whom notice shall be given of any injury done by his dog to any sheep, or of his dog having chased or worried

¹ 13 Wend. 312. 4 Cowen, 351. 21 Wend. 407. 17 Barb. 565. 31 Conn. 121. 24 How. Pr. R. 481, 484. 15 Abbott, 167, 172.

² 23 Wend. 354. 23 Barb. 324. 31 Conn. 121.

³ 9 John. 233.

⁴ 22 Barb. 506.

⁵ 23 Barb. 324.

⁶ 7 Mich. 158. 23 Vt. 236. 4 Burr. 2994. 33 Mo. 138.

⁷ 6 Blackf. 258. 9 Ind. 399.

⁸ 16 Ind. 414.

⁹ 2 E. D. Smith, 90.

¹⁰ 32 Cal. 205.

any sheep shall, within forty-eight hours after such notice cause such dog to be killed: for every neglect so to do he shall forfeit two dollars and fifty cents, and the further sum of one dollar and twenty-five cents for every forty-eight hours thereafter until such dog shall be killed, unless it shall satisfactorily appear to the court before which a suit shall be brought for the recovery of the said penalties, that it was not in the power of such owner or possessor to kill such dog.¹

§ 640. It is also provided by the same statute that "if any dog shall attack any person peaceably traveling on any highway, or any horse in a carriage or upon which any person shall be mounted, and complaint thereof be made to a justice of the peace, such justice shall inquire into the complaint, and if satisfied of its truth and that such dog is dangerous, he shall order the owner or possessor of such dog to kill him immediately;" and for a neglect to kill him within forty-eight hours after receiving the order he shall forfeit the sum of two dollars and fifty cents, and the sum of one dollar and twenty-five cents for every forty-eight hours thereafter until the dog be killed.² The penalties in both cases provided by the statute are to be prosecuted for by the supervisor.

§ 641. It was stated in a former part of this work that, generally, one is not liable for injuries committed by domestic animals, unless he is shown to have had notice of their having been accustomed to do mischief.³ The New York statute, however, excepts from this rule injuries committed by dogs upon sheep or lambs. The owner or possessor of any dog that shall "*kill or wound*" a sheep or lamb is made liable without proving any notice that the dog was mischievous or disposed to kill sheep.⁴ A similar statute in Ohio is construed in the same manner.⁵ It is held, however, that the statute does not extend to a case where a dog merely *chases and worries* sheep, if the master did not know that he was accustomed to do so. The common law rule prevails in such a case.⁶ Under the statute just referred to, the owner of the dog is liable for the full value of the sheep if they are wounded, even if they do not die of the wound.⁷ In case of an injury, the owner "may apply to any two fence viewers of the town, who shall inquire into the matter and view the sheep injured or killed, and may examine witnesses in relation thereto, for which purpose

¹ 1 R. S. 705, §§ 15, 16. 2 *id.* (Banks' 5th ed.) 976.

² 1 R. S. 706, §§ 17, 18. 2 *Id.* (Banks' 5th ed.) 976.

³ Ante, § 494 to § 496.

⁴ 1 R. S. 704, § 9. 2 *id.* (Banks' 5th ed.) 975.

⁵ 13 Ohio N. S. 485.

⁶ 1 Denio, 495. 49 Barb. 145.

⁷ 49 Barb. 145.

either of them shall have power to administer oaths. If they are satisfied that the same were killed or hurt only by dogs, and in no other way, they shall certify such fact, the number of the sheep killed or hurt and the amount of the damages sustained thereby by the owner, together with the value of the sheep hurt or killed," which "certificate shall be presumptive evidence of the facts therein contained in any suit that may be brought by the party injured against the owner or possessor of any dog, if it shall appear on the trial of such suit that due notice was given to the owner of the dog of the intended application to the fence viewers."¹ It will be observed that the inquiry of the fence viewers is not directed to the ownership of the dogs by which the injury was committed. The plaintiff in making his claim must prove the killing or injuring of the sheep by the defendant's dogs, and then the certificate furnishes presumptive evidence "that the sheep were killed or hurt only by dogs, and in no other way, and of the amount of damages sustained, together with the value of the sheep hurt or killed." This application to the fence viewers is cumulative, the owner of the sheep having the right to bring his action without applying to them to inquire into the matter.² In Wisconsin, under their statute (chap. 48, R. S., and chap. 175, Laws of 1860), the owner of sheep killed by dogs has two remedies: he may make his claim against the town, or against the owner of the dog, and he may elect which he will pursue; having chosen one of these remedies he cannot afterward pursue the other.³

§ 642. Where two dogs, owned by different persons, attack and injure sheep in a flock, each person is answerable only for the injury which his dog does to the sheep, a joint action not being sustainable.⁴ The same rule applies where cows belonging to several owners trespass upon another, doing damage.⁵ In the absence of all proof, the inference is, that the animals did equal damage;⁶ but when two dogs, of different sizes, kill sheep, in the dark, the jury, in the absence of other proof, have the right to determine that the biggest dog did the most of the injury.⁷ Where the defendant's hired laborer has a dog, which follows his master to the defendant's premises during the day time, but returns to his master's house at night, he is not to be deemed

¹ 1 R. S. 704, §§ 10, 11. ² *id.* (Banks' 5th ed.) 975.

³ 21 Barb. 333.

⁴ 16 Wis. 566.

⁵ 17 Wend. 562. 1 Denio, 495. 9 Ind. 72. 14 id. 317. 20 Pick. 479.

⁶ 20 Barb. 479.

⁷ 20 Barb. 479. 20 Pick. 479.

⁸ 35 Barb. 303.

the owner or possessor of the dog under the provision of a New York statute declaring "Every person in possession of any dog, or who shall suffer any dog to remain about his house for the space of twenty days * * * previous to any injury, chasing or worrying of sheep, or any attack made by a dog, shall be deemed the owner."¹ When, however, one harbors a vicious dog about his premises, or allows it to resort to them, although he does not own it, it is sufficient to render him responsible for any mischief he does; and so of other animals.² With the exceptions mentioned in the preceding sections, no one is justified in killing a dog, even while he is in the act of chasing or worrying cattle, fowls, &c., unless it can be shown that he could not otherwise be separated from them.³ The fact should be pleaded in the answer, as a defense, and the question will then be one of fact, whether the circumstances of the case rendered it necessary to kill the dog to preserve the animal attacked by it. And where a plea simply alleged that the plaintiff's dog fell upon and bit the defendant's dog, wherefore, in defense of his own dog, he killed him, it was adjudged bad, for the reason that the defendant did not also allege that he could not otherwise save his own dog.⁴

§ 643. But where, on a trial, it appeared that a dog, at the time he was killed, was running off with defendant's fowl in his mouth, and was called after to give it up, a verdict in favor of the defendant was sustained by an appellate court.⁵ A notice, posted upon one's grounds, that dogs trespassing upon them would be shot, does not justify their owner in shooting the plaintiff's dog trespassing there.⁶

§ 644. Where an action is brought against one for killing the plaintiff's dog, and the defendant justifies the killing by pleading in his answer that the dog was accustomed to attack and bite mankind, or that he was ferocious and dangerous, these allegations are material facts, and, if proved, the plaintiff may call witnesses to controvert them and show the general quietness and good temper of the dog.⁷

§ 645. Whenever one has been injured by means of any imposition, knavery, fraud, willful misrepresentation or concealment in the sale, purchase or exchange of personal property, the fraud avoids it,⁸ and notwithstanding the contract of sale may have been made in writing,

¹ R. S. 706, § 20. 2 id. (Banks' 5th ed.) 976. 1 Denio, 495.

² 17 Wend. 496. Ante, § 540. 5 Car. and P. 1. 16 Ind. 251.

³ 4 Cowen, 351. 1 Saund. 84. 1 Camp. 41. 4 Car. and P. 568.

⁴ 1 Lev. 216.

⁵ 9 John. 233.

⁶ 2 Marsh. 584.

⁷ 1 Car. and P. 104.

⁸ 2 Kent, 482. Ante, § 76.

or under seal, the plaintiff may bring his action for his damages and give parol evidence of the fraudulent practices.¹ Fraud is a crime; and whenever a court or jury are convinced of its existence, to the injury of another, they may, and should give damages as in other actions for wrongs involving moral guilt, with a liberal and unsparing hand, both to compensate the plaintiff for his extraordinary trouble in vindicating himself against the injury, and to furnish a moral lesson to the country by the punishment of the defendant.²

§ 646. In cases where one has been injured by a fraud in a sale or purchase, it is generally better to bring an action for the fraud than upon the contract. If the action be upon the contract, the person of the defendant, ordinarily, is not liable on execution, while it is for injuries not arising on contract.

§ 647. IV. INJURIES TO PERSONS OR PROPERTY, AND THE TAKING AND DETENTION OF PERSONAL PROPERTY UNDER COLOR OF LAW, OR OF LEGAL PROCESS. The cases arising under this title generally fall within one of the following classes: 1. Where there is a want of jurisdiction in the court or magistrate who issues the process, under color of which the act complained of was committed. 2. Where, although the court or magistrate has jurisdiction, their acts were void for irregularity. 3. Where the officer, having process to execute, exceeds his authority. 4. Where the officer undertakes the execution of process which is void upon its face.

§ 648. (1.) *Where there is a want of jurisdiction.* Jurisdiction is a power which a court, judge or other magistrate has, to take cognizance of, and decide causes brought before him, according to law, and to carry his sentence into effect.³ It is said that all jurisdictions are limited, as to place, persons and things.⁴ This is true, in a certain sense. Thus, the supreme court of New York is limited in its jurisdiction to the territory of the state, to persons within it, or who may be reached by its process, and to things within it; and, so far as its original jurisdiction is concerned, it is limited to remedies in civil, as distinguished from criminal cases. But it is not meant that all jurisdictions are limited to a particular portion of the territory of the state, nor to a particular class of persons, or a certain description of things.

§ 649. Jurisdiction is said to be *general* where the powers of the

¹ 13 John. 325, 395.

³ Bouvier's Law Dic. Jurisdiction.

² Hall's Law Journ. 618, 620. Infra,

⁴ Rep. temp. Anne, 104.

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court or judge extend throughout the state, and include the cognizance of all actions and of all persons within it. Where their powers are confined to a particular territory, or to a particular class of actions or of persons, the jurisdiction is termed *limited* or *inferior*. It is again subdivided into *original*, when it is exercised by the court or judge in the first instance, and *appellate* when it only authorizes a review of the decisions of other courts; *civil*, where it relates exclusively to the adjustment of rights between different persons, and *criminal* where it has cognizance of persons accused of crimes. The New York supreme court is, by the constitution, declared a court of general jurisdiction in law and equity.¹ The county courts, surrogates' courts and justices' courts, being limited in the subject-matter over which they have jurisdiction and the territory within which they may exercise their functions, are courts of *inferior* jurisdiction.

§ 650. Courts of inferior jurisdiction cannot go beyond the authority conferred upon them by the statute. They can assume no power by implication, but must keep within the powers expressly given them, and if they go beyond them, their acts are void.² Thus, if a court having only civil jurisdiction should try a man for felony,³ or a justice one for murder,⁴ or if it should render a judgment for a sum exceeding its jurisdiction,⁵ or take cognizance of a suit for less than the amount required to give it jurisdiction,⁶ or try an assault and battery or slander,⁷ all their acts would be void. In like manner, where the law authorized assessors to lay a tax on residents of the town for certain purposes, and they laid it upon the lands of a non-resident, it was held void.⁸

§ 651. Within the rule laid down in the last section, it has been held that, where a justice was authorized to issue a warrant against an inhabitant of the same county found traveling on Sunday, and he issued it against one not an inhabitant, his warrant was void;⁹ where he issued an execution against the body of a person exempt from such process he was a trespasser;¹⁰ where the statute gave magistrates power to proceed by warrant against the property of an absconding

¹ Const. art. 6, § 3. 1 R. S. (Banks' 5th ed.) 61.

² 1 John. Cas. 228. Id. 20. 19 John. 39. 3 Cowen, 206. 22 How. P. R. 361. 5 Cal. 195. 33 id. 318. 34 id. 321. 35 id. 269. 26 Mo. 65. 20 Ill. 525. 34 id. 168. 4 Greene (Iowa), 291.

³ 10 Coke, 76.

⁴ 1 Conn. 45.

⁵ 13 Wend. 404.

⁶ 2 Minn. 86.

⁷ 15 John. 493.

⁸ 13 John. 444. 1 Kern. 563. 15 N. Y. 316. 11 Mass. 220.

⁹ 13 Mass. 324, 342.

¹⁰ 2 John. Cas. 49.

husband for the support of his family, and they proceeded, when in fact the husband had not absconded, their acts were void; ¹ if an army court-martial should arrest and try a citizen, not on military duty, as a spy, ² or a militia court-martial fine one by law exempt from military duty, ³ or an United States court-martial condemn a militia man not in actual service, but only summoned to go into service, ⁴ their acts are void. In like manner, where an inferior officer was arrested and tried before a court-martial for refusing, on the requisition of his superior officer, to attend a writing school established in the army, but without competent authority, the judgment was held void on the ground that the arrest and trial were void; ⁵ and where the ordinary had no power to grant letters of administration while an executor was living, and the executor being living, but absent, he appointed one; his act was held void, and that a judgment rendered against such administrator was also void, ⁶ for the ordinary had no jurisdiction of the cause, and the court which rendered the judgment, had neither jurisdiction of the person proceeded against, or the property levied upon by virtue of its judgment, and hence all the proceedings were void.

§ 652. In courts of inferior jurisdiction, it is necessary, also, that the court should have jurisdiction of the process, as well as of the subject-matter of the action. ⁷ If, therefore, a justice should issue process which he has no authority for issuing, as a warrant to an officer to search all suspected persons or all suspected places for stolen goods, ⁸ or should direct an officer, without process, to arrest a party, to answer the plaintiff, any judgment rendered thereon would be void; ⁹ or if a court should act upon process unknown to the laws or which it could not use, its proceedings would be void. ¹⁰ If, however, the process be void, yet if the defendant appear at its return, and, without objecting to it, joins issue upon the merits, the justice will thereby acquire jurisdiction. ¹¹ And it is held that a summons returnable at a longer date than is allowed by the statute in that particular case is not void, and the defect is cured by the omission to take the objection. ¹²

¹ 6 Cowen, 234, 237.

² 12 John. 257.

³ 3 Cranch, 331.

⁴ 19 John. 7. 20 id. 343.

⁵ 4 Taunt. 66.

⁶ 8 Cranch, 10.

⁷ 19 John. 40. 3 Cowen, 206.

⁸ 1 Conn. 40.

⁹ Hob. 63.

¹⁰ Cowen & Hill's Notes, 1000.

¹¹ 2 Hill, 657. 1 Wis. 597. 13 id. 635.
5 Cal. 494. 18 Ill. 29. 18 Ind. 1.

¹² 52 Barb 158. *Infra*, § 663.

§ 653. It is also necessary that the process be properly served. It is a general rule that a party proceeded against must be notified in some legal manner of the proceeding, in order to give the court or magistrate jurisdiction of his person.¹ It need not always be personal. The legislature may prescribe the manner of service as it has in suits commenced by attachment; but it must be in compliance with the law.² If process be executed by a constable not having authority, it gives the magistrate no jurisdiction, and if he proceed he is liable;³ and where the statute prescribes the mode of acquiring jurisdiction of the person, it must be complied with, or the subsequent proceedings are a nullity.⁴ Where the statute required delinquents to be summoned to court-martial before fines should be imposed, and one was summoned by leaving a written summons at his place of residence in his absence, and upon the ground of such service the court imposed a fine, the president of the court was held liable to refund it.⁵ In another case, where a freeholder could only be sued before a justice of the town where he resided, and the process was required to be served personally, or by leaving it at his dwelling-house or place of abode, the constable return that he served the process by leaving a copy at the defendant's last place of residence in the town, was held to confer no jurisdiction, and that it was notice to the justice and party of the defendant's non-residence, so as to render them liable for acts done under an execution upon a judgment obtained under it; but the execution being regular upon its face, it protected the constable who served it.⁶

§ 654. If a court, whether of limited jurisdiction or not, undertakes to hold cognizance of a cause without having gained jurisdiction of the person in the manner required by law, the whole would be void,⁷ as where one falsely pretended to have authority to confess judgment for another without process.⁸ A judgment cannot be entered on confession unless the defendant is brought into court by process, or in pursuance of the provisions of the statute.⁹ Where a judgment was entered in pursuance of an authority given to the justice by the defendant at a casual meeting in the street, and an execution was levied upon his property and sold, it was held that the whole was void and the sale gave no title to the purchaser.¹⁰

¹ 3 Seld. 431.

² 6 Abbott, 162. 34 Barb. 95. 32 id. 604.

³ 7 Cowen, 269.

⁴ 1 Hill, 130. Note 2, supra. 1 Denio, 592. 17 Abbott, 166. 3 Iowa, 114.

⁵ 7 John. 96.

⁶ 1 Wright (Ohio) 709.

⁷ 19 John. 41. 41 Barb. 102. 6 Cal. 318.

⁸ 15 John. 244.

⁹ 2 R. S. 245, § 114. 3 id. (Banks' 5th ed.) 443, § 105. Code, § 53, subd. 8.

¹⁰ 8 Wend. 569. 15 John. 476. 6 id. 126.

§ 655. If a justice should assume to act beyond the limits of his territorial jurisdiction, by issuing process, or doing any other official act without his county, or trying a civil cause in any other town than the one in which he was elected, in cases not specially provided for by law,¹ or if he should entertain an action when he is prohibited from acting in any case, his acts would be void.² These illustrations are, of course, applicable only to the state of New York, and such others as have similar statutes. The general rule is believed to be of universal application.

§ 656. In each of these cases where the proceedings of a court of inferior jurisdiction are void for want of jurisdiction, the consequence of the judgment being void does not extend merely to protect the defendant from it. It is as if there had been no action, and the plaintiff is not barred by it from bringing another action for the same cause before a competent tribunal; as where an action for an assault and battery had been brought before a justice and tried upon the merits, and a judgment was rendered for the defendant, the judgment was held no bar to a subsequent action for the same cause.³ And where an appeal is brought upon a judgment rendered by a justice in an action over the subject-matter of which he has no jurisdiction, the appellate court should refuse to entertain the action and not render its judgment upon it.⁴

§ 657. Judgments and proceedings of courts where they have no jurisdiction, may be assailed in various ways. In some cases they are for certain purposes regarded as valid until reversed or vacated; as where, although they may be reversed or vacated by an appellate court, they are, while they remain, regarded as sufficient to protect a person acting under them, or to secure a right or title to property founded upon them. The questions which may arise in relation to them in an appellate court can rarely be of any practical interest to a justice of the peace. Those only, therefore, which may be litigated in his court when the validity of such judgments are attacked *collaterally*, as in another action, and not in a proceeding to reverse or vacate them, are here examined.

§ 658. In most cases, questions as to the validity of such judgments arise in actions against the party, or the justice, or the officer executing the process of the court, at the suit of the individual affected by the

¹ Cro. Car. 218.

² 14 John. 432.

³ 2 Caines, 108. 8 John. 409. 13 id.

⁴ 2 Hill, 657.

218. 41 Barb. 200.

judgment or proceeding which he alleges to be void for want of jurisdiction. The rule is now settled that, where the court has no jurisdiction, the court and party and any other person who has directed the service of the process is liable to the defendant for all acts done under color of the judgment.¹ But a ministerial officer, as a sheriff or constable, is protected in executing the process of an inferior tribunal if the subject matter is within its jurisdiction, and nothing appears upon its face to show a want of jurisdiction in the person or place.² And it makes no difference if the officer knew it to be void.³ The same rule is extended to the collector of a school district, who has a tax list and warrant issued by the trustees, regular upon its face, and a collector of county or village taxes.⁴ If the process shows on its face that it is irregular, illegal or void, it will not afford the officer who executes it any protection.⁵ Although in case of void process, the officer knowing it to be such, may execute it, he is not bound to.⁶ If, however, there is merely some irregularity in issuing it, which does not affect the jurisdiction, the officer must execute it.⁷ This immunity of the officer as above stated is a rule for his protection merely.⁸ He may defend himself under the process, but he cannot build up a title upon it, so as to maintain an action upon it against third persons. Where, therefore, a constable, in order to justify a seizure of goods upon a justice's attachment, is obliged to attack a sale by the debtor as fraudulent in respect to creditors, he must produce and prove not only the attachment but the preliminary proceedings under it authorizing it. So, if the seizure is made upon execution, he must prove the judgment upon which it was issued.⁹ These rules apply to officers only. Any person claiming the benefit of their official acts, must prove the judgment or other authority for the acts.¹⁰

§ 659. The party aggrieved by a judgment void for want of jurisdiction in the court rendering it, may have his action against all per-

¹ 11 John. 444. 15 id. 152. 28 N. Y. 659. 20 Ill. 291. 11 Wis. 91. 8 Mich. 537. 2 Nevada, 100.

² 5 Wend. 170. 1 Seld. 376. 5 id. 208. 31 Barb. 312. 4 Mich. 291. 7 Wis. 128. 14 id. 88. 25 Ill. 70, 156. *Infra*, § 666. 5 Minn. 397. 7 Ohio N. S. 43, 51.

³ 24 Wend. 485. 5 Hill, 440. 20 Barb. 165.

⁴ 7 Wend. 89, 392. 2 Denio, 86. 2 Coms 473. 25 Ill. 156. 1 Wis. 457.

⁵ 18 Barb. 327. *Infra*, § 667.

⁶ 7 Hill, 35. 16 Wend. 562. 48 Barb. 85.

⁷ 3 Seld. 195, 199.

⁸ 24 Ill. 553.

⁹ 1 Hill, 118. 5 id. 194. 6 id. 311. 1 Hilton, 117. 2 id. 212. 5 Minn. 397. 6 id. 412.

¹⁰ 5 Minn. 397. 6 id. 412.

sons having knowledge of and participating in the action or proceeding.¹ Thus, if he should be arrested, or his close entered, or his goods taken by execution upon the judgment, he may recover his damages, for the injury, against the magistrate and the party, and his attorney also if he has actively directed the service of the process, in the same manner as if the act complained of had been committed without color of law. Under the rules relative to the want of jurisdiction, a sheriff who levies on the goods of a stranger to the execution is liable, but if they are so mingled with the goods of the execution debtor as to be undistinguishable, a demand for them and which properly distinguishes them from the debtor's property, must be made before the bringing of a suit.² An officer cannot legally take the property described in a writ of replevin when it is neither actually nor constructively in the possession of the party named in the process.³ Where a judgment was rendered by a justice against two defendants, when he had obtained jurisdiction over but one of them, and an execution which, by its terms, was leviable on the individual property of either, was issued by him and levied on the property of the one who was not bound by the judgment, it was held that the justice was liable therefor, and also the execution plaintiff, he having asked for the execution, participated in the proceedings under it, and taking the proceeds of the sale.⁴ And, in general, when the execution plaintiff buys in the defendant's property to satisfy his debt, he is chargeable with all irregularities; but a stranger, who buys in good faith, is only chargeable if there is a want of jurisdiction, or other substantial defect in the proceedings.⁵

§ 660. Where the tribunal or magistrate has jurisdiction of the person and subject-matter, errors committed in the exercise of the jurisdiction will not vitiate the proceedings. That jurisdiction being established, the court may proceed to almost any length in the exercise of its judicial functions without incurring any liability.⁶ And not only is the court protected, but also the party, his attorney, and all persons acting in obedience to the order or judgment of the court.⁷ Where a plaintiff insisted upon and obtained a judgment against a defendant who had been discharged from imprisonment as an insol-

¹ Ante, § 658.

² 12 Cal. 275, 469. 10 Wis. 91.

³ 14 Ohio N. S. 73.

⁴ 18 Cal. 397.

⁵ 1 Oregon, 19.

⁶ 4 Denio, 120. 1 Kern. 573. 19 Barb.

283. 38 id. 339. 19 Ill. 242. 22 id. 100.

27 id. 467. 48 id. 303. 16 Wis. 298. 20

Mo. 22. 6 Ohio N. S. 302. 3 Greene

(Iowa), 584. 14 Iowa, 510. 18 id. 153.

2 Nevada, 100. *Infra*, § 697.

⁷ 3 Sand. 328. 19 Barb. 283. 13 id. 239.

vent, and imprisoned him, the plaintiff was protected, for the justice had jurisdiction of both the person and the matter, and any judgment he gave was conclusive until reversed.¹ So where a justice has jurisdiction to give costs and gives more than the statute authorizes, it is mere error, and the judgment while unreversed protects him for acts done in the way of collecting it.² These rules apply to cases of the determinations by assessors of real estate of questions of residence,³ and to apportionments of taxes by the proper officers,⁴ and boards of pilots.⁵

§ 661. Where the jurisdiction of an inferior court depends upon a fact which it is required to ascertain and settle by its decision, its decision is held to be conclusive.⁶ Where such fact is asserted in the record, a party who contested the merits, without raising the question of jurisdiction, cannot afterward, in a collateral action, show that the jurisdictional fact did not exist.⁷ The consequences of an ascertained jurisdictional defect in avoiding a judgment, are the same whether the court be of general or inferior jurisdiction. The distinction lies in the mode of reaching the defect. In regard to courts of general jurisdiction, the jurisdiction is presumed until the contrary appears. In the case of inferior courts, it is never presumed, but must in all cases be proved.⁸ But when it is proved, the same presumptions obtain as in a court of general jurisdiction.⁹

§ 662. The rule contained in the last section does not extend to a case where certain facts are required to be proved to the magistrate in order to give him jurisdiction to proceed, as in a case where a justice, who is authorized to issue an attachment "whenever it shall satisfactorily appear to him" that a debtor has departed the county with intent to defraud creditors, and the proof offered showed only the *belief* of the party that such was the fact, issued an attachment, it was held that his proceeding was void and he a trespasser.¹⁰ In such a case there must be *proof of facts* which may tend to produce a belief in the mind of the justice, and which furnish what is called *colorable* proof, before he obtains jurisdiction.¹¹ But, having that

¹ 5 Wend. 298.

² 10 Barb. 295. 17 John. 145. Cowen & Hill's Notes, 994.

³ 24 Barb. 419. 19 id. 22. 8 Den. 117.

⁴ 21 Barb. 207.

⁵ 6 Cal. 94.

⁶ Cowen & Hill's Notes, 1016 to 1020.

4 Denio, 120. 1 Seld. 497. 38 Barb. 51. 15 Ind. 395.

⁷ 1 Seld. 434.

⁸ 1 Hill, 131. 4 Iowa, 77. 15 Cal. 296. 17 id. 363. 6 Minn. 412. 18 Ill. 292.

⁹ 7 Iowa, 324.

¹⁰ 10 Wend. 420.

¹¹ 11 John. 177. 4 Denio, 118.

proof before him, if he errs in his estimate of the evidence furnished him, it is a judicial error for which he is not responsible.¹ So if he has authority in certain cases to issue a warrant without oath, and on account of his ignorance of the fact he does so in a wrong case, he will not be held answerable if he acts in good faith.² And wherever he has jurisdiction of the person and the subject-matter, any errors he may make in the exercise of his jurisdiction are judicial errors for which he is not liable. Thus a court having jurisdiction of a criminal case will be protected although it adjudges a matter criminal which is not so and proceeds to punish it.³

§ 663. (2.) *Of proceedings void for irregularity.* An irregularity is either the omission to do something necessary for the due and orderly conducting of an action or legal proceeding, or the doing it in an unseasonable time or in an improper manner.⁴ An error is where the court or magistrate, in the regular course of an action or judicial proceeding, makes a mistake of the law. A justice's court exercising an inferior jurisdiction must pursue strictly the provisions of the statute in its proceedings, and, unless they are observed or waived by the party who has a right to insist upon them, the judgment is irregular and void. If a justice should give judgment against one who is not in court and who has not been served with summons or process to appear before him, he will have acquired no jurisdiction of him, and the judgment will, for this cause, be void.⁵ And so, if the defendant has been served with a summons to appear on a certain day or at a certain hour, and previous to the time specified in the summons the justice calls the action, hears the proof and renders a judgment, the judgment will be void.⁶ The same result would follow if the justice should issue an attachment without the proof required. Here he would act without jurisdiction. And so would he, and his proceedings would be void, should he omit to take from the plaintiff in the action the bond required by the New York statute.⁷ But if the action were well commenced, and the proceedings were all regular, and the justice should give judgment upon insufficient proof, or by the admission of improper testimony, and upon this testimony should give judgment in his favor, or commit irregularities, the

¹ 4 Denio, 118. 18 N. Y. 355. 34 Barb. 144. 45 id. 394.

² 6 Wend. 597.

³ 1 Mill. Lou. 131. 2 Lutw. 1561, 1562. 1 Pet. C. C. 30, 39. 3 id. 193. 18 Iowa, 153.

⁴ Tidd, 434.

⁵ 15 John. 244. Ante, § 654.

⁶ 41 Barb. 102.

⁷ 2 R. S. 230, § 29. 3 id. (Banks' 5th ed.) 431, § 27. 4 Coms. 254. 14 Barb. 96.

judgment would be *erroneous*, and not void, but simply liable to be reversed by an appellate court.¹ In like manner where the statute limits the amount of the plaintiff's costs to five dollars, and he renders judgment for a larger sum, it is *error* to be corrected, and not an excess of jurisdiction or irregularity which would render the judgment void.² But where the statute prescribes a particular time for the return of an execution, and he issues an execution returnable in a shorter time, it is irregular, and as the irregularity is apparent upon its face the officer executing it would not be protected by it.³ But it is held in one case that if the execution is returnable in a longer than the statutory time, whereby the plaintiff loses his debt, he cannot recover judgment against the justice who issued it for his damages, because in issuing the execution he was acting still as a judicial officer,⁴ a rule which has not been applied in this and other states.

§ 664. Where there has been an irregularity in a justice's court, all the proceedings subsequent to it are void, unless the irregularity is waived by the party who has the right to take advantage of it;⁵ and the party committing the irregularity and all others acting in his behalf, excepting an officer executing process issued thereafter which is good upon its face, are liable for every subsequent act.⁶ Where the irregularity is in the proceedings of a court of record, the subsequent proceedings are *voidable* and no advantage can be taken of the irregularity until they are set aside by the court; but, when set aside, the aggrieved party may maintain an action for any act performed by his opponent subsequent to the irregularity.⁷ The officer, however, would not be liable.⁸ In courts of record the judges are not liable for irregularities, the process being prepared by the party or his attorney.

§ 665. Justices' courts in New York possess the same general powers in amending their proceedings that courts of record have.⁹ Where a justice issued an execution upon a judgment, and by mistake directed the constable to levy a different sum from the one recovered in the judgment, and an action was brought against him for a levy

¹ 23 Barb. 313. 1 Seld. 531.

² 17 John. 145.

³ Ante, § 652. 5 Wend. 276. 9 id. 338.

⁴ 30 Mo. 420.

⁵ 10 Ohio N. S. 621. 13 Iowa, 247. 1 Kansas, 365.

⁶ Esp. Dig. vol. 1, pt. 2, 275. Ante, 178.

⁷ 3 Caines, 267. 28 N. Y. 659. 34 Barb. 149, &c.

⁸ 11 Wend. 31. 28 N. Y. 664.

⁹ 2 R. S. 225, § 1. 424, § 1, &c. 3 id. (Banks' 5th ed.) 426. Id. 721 10 Wend. 214. 1 Barb. 552. 3 E. D. Smith,

thereon, the supreme court held that it would not, for the variance, treat it as a case where the execution issued without authority, and allowed the mistake to be shown, and treated the recital as true.¹ There the execution might have been amended before its return, although after its return it could not.² A summons, however, is amendable after its return, as where one of the plaintiffs whose name was Jasper was named in the summons Joseph.³ Further decisions in regard to amendments in justices' courts are found, *infra*, sections 850, 1661.

§ 666. Where officers have acted under process, regular upon its face, but which has been issued upon an irregular judgment, the same rule prevails, as in the case of process upon judgments void for want of jurisdiction, of which we treated (*ante* section 658), for convenience, including in our references some cases of irregularity. In these cases, as in those, the rule is that when process is regular upon its face and has nothing to show that the court or magistrate had no jurisdiction, or that it was irregularly issued, or issued upon a void judgment, it furnishes a perfect protection to the officer to whom it is directed.⁴ But where upon its face there is evidence that it is irregular, or issued without jurisdiction, or otherwise void, it is no protection.⁵ The rule is that process valid upon its face will justify the officer, but that he is liable for any act done under process void on its face. And if it is void upon its face, by reason of commanding the officer to execute it in an illegal manner, it will not protect him though he execute it in a legal manner.⁶

§ 667. Where a court or magistrate has no jurisdiction of the process, and it appears by the process, both the officer who issues it and he who serves it becomes a wrong-doer.⁷ Thus, if he issues a warrant which on its face shows a case where a summons only can issue, it will protect neither the magistrate or the officer executing it. In like manner, if an officer serves process not directed to him, as where a warrant directed "To any constable of ——," was delivered to an officer to execute, it is no protection from the consequences of his acts in serving it,⁸ and a commitment upon a conviction for petit larceny directed in the same manner and delivered in court to the constable who had the prisoner in his custody was held a nullity.⁹ So where a

¹ 4 Wend. 568, 585.

² 5 Wend. 276.

³ 10 Wend. 213.

⁴ 5 Wend. 170. 6 id. 367. 12 id. 496.
24 id. 485. 5 Hill, 440. 2 Coms. 473.

⁵ 8 Minn. 477. *Infra*, § 851.

⁶ 16 Wend. 607.

⁷ *Supra*, §§ 658, 666.

⁸ Add. 376.

⁹ MS. case of *Fuller v. Hubbard*, decided by the supreme court, 5th dist.

New York magistrate issues a search warrant directing the officer to whom it is addressed to search all suspected places, the officer is liable for executing it, and he would be liable if it omits to specify the place to be searched or the goods to be searched for. It is no excuse for the officer that he was ignorant that the magistrate had no authority to issue such a process. His ignorance would be of the law, which does not excuse.¹

§ 668. The power to issue a search warrant in New York is given by statute. It is provided in the bill of rights of the constitution of the United States that "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures ought not to be violated; and no warrants can issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."² The New York statute passed in conformity with this provision is as follows: "Upon complaint being made on oath to any officer or magistrate authorized to issue warrants for the apprehension of offenders, that any personal property has been stolen or embezzled, and that the complainant suspects that such property is concealed in any particular house or place, if such magistrate be satisfied that there is reasonable ground for such suspicion, he shall issue a warrant to search for such property. Such warrant shall be directed to the sheriff of the county, or any constable or marshal of the town or city, and shall command him to search the place where such property is suspected to be concealed, in the day-time (which place shall be particularly designated, and the property shall be particularly described in such warrant), and to bring such property before the magistrate issuing the warrant. If there be positive proof that any property stolen or embezzled is concealed in any particular house or place, the warrant may authorize the searching of such house or place in the night-time. Every such warrant shall be executed by a public officer, and not by any private citizen."³ It is necessary to the regularity of the proceeding that each of the provisions of the statute be observed. If they are, neither the magistrate or officer will be liable, although none of the goods supposed embezzled or stolen are found. It is, therefore, advisable to recite the complaint in the warrant, though it is not absolutely necessary. The provision requiring the warrant to be served by an officer does not preclude him from taking necessary

¹ 1 Conn. 40. 13 Mass. 286, 289.

² 2 R. S., 746, §§ 25 to 28. 3 id. (Banks'

³ Con. U. S. 4th amendment. 1 R. S. 5th ed.) p. 1040, §§ 32, &c.

(Banks' 5th ed.) 18.

assistance with him. It would manifestly be proper that the owner should accompany him for the purpose of identifying the property. It is not necessary that the warrant state the owner of the goods.¹ It must be under seal, and be directed exactly as prescribed by this statute. A direction "To any constable" of the county, only, would be insufficient.²

[§ 668a]. By a recent statute of New York, the above act is extended to the case of mineral water bottles, properly stamped or registered, where the agent or owner shall make oath or affirmation before a magistrate that he has reason to believe and does believe that any of his bottles, so stamped or registered, are being unlawfully used for selling or manufacturing mineral water or other beverages; or that any junk dealer or dealer in bottles has secreted any of them; the act also providing for a summary disposition of the matter.³

§ 669. In executing a search warrant, the officer may, after demanding admittance to the house described in the warrant, if it be refused, break open either the outer or an inner door;⁴ and, in like manner, if he demands that any trunks, chests or boxes be opened for the purpose, or their key delivered to him, and a compliance with the demand be refused, he may break them open.⁵

§ 670. (3) *Where the officer having process exceeds his authority.* The party suing out process from a competent court, is responsible only for its validity, and for good faith in suing it out, but is not answerable for any acts of the officer to whom it is delivered, beyond its authority, unless done by his direction. Thus, if a sheriff serve any process after the return day, without the direction of the plaintiff, the officer alone is accountable. The same rule applies to a justice who issues process to a constable. In the case of a party, he may be liable, if he has subsequently ratified the act, with a full knowledge of all the facts.⁶ The receipt of the money, by the party or officer, would not be a sufficient ratification in the absence of that knowledge.⁷ Neither is he liable for the abuse of the process, as if the officer should levy upon property exempt from execution, unless he directed the officer to do it.⁸

§ 671. If an officer, upon an execution against A., levies upon the property of B., he is liable therefor;⁴ but the law will not, without

¹ 10 John. 263.

⁹ John. 117. 4 id. 450. 8 Barb. 355.

² 3 Park. Cr., 656.

⁷ 2 Seld. 331.

³ Laws of 1860, chap. 117, p. 194, § 2.

¹⁴ John. 246. 2 Coms. 517. 7 Minn.

⁴ 1 Conn. 40. 10 John. 263. Crocker 184.

on Sheriffs, § 80.

¹² Cal. 275. 8 Minn. 265.

⁵ 1 Chitty's Cr. Law, 66.

other proof, impute the act to the plaintiff; and the fact that his attorney ordered the officer to make the levy, is no evidence of the plaintiff's participation in the wrongful taking.¹ But where it appears that the plaintiff directed it, he, as well as the officer, are liable as joint trespassers, and the plaintiff, in that case, cannot insist that the process, and not his direction, influenced the officer.² The rule is the same where another person than the plaintiff in the execution directs or indemnifies the officer in making a wrongful levy.³

§ 672. Whenever a sheriff or other public officer has process which it is his duty to execute, he may call upon any person to assist him in executing it. The sheriff may also call upon any one to aid him in preserving the peace and arresting offenders, and one who refuses to assist him is punishable.⁴ This common law doctrine is affirmed, in New York, by an express statute.⁵ One acting under his command, in his aid, may justify as he may,⁶ but if the sheriff or officer be acting under a process, invalid on its face, and which would not protect him, the person acting in his assistance is not protected.⁷ The process must be such that upon its face the officer is compellable to execute it. And the protection does not extend to volunteers not called upon to aid him.⁸ Under the statute just referred to, the sheriff can only "command as many of the male inhabitants of 'his county,' as he shall think proper, to assist him in overcoming resistance to the execution of process delivered to him." Consequently, he has no authority to command one to assist him in doing an act in another county, except when passing through it, with a prisoner, or carrying a convict through to prison.⁹

§ 673. As there are frequently questions arising in relation to the validity and priority of liens upon property by virtue of executions, a reference to the rules in relation to the subject will be useful under this title. At common law, executions issued from courts of record, were regarded as issued only during the terms of the court. If issued in vacation they were deemed to have been issued on a day of the preceding term named in the *teste* of the writ, and the title to any personal property which the defendant in the execution had at the day

¹ 1 Denio, 501. 4 id. 295.

² Ante refs. in note 8, § 670.

³ 5 Denio, 92. 4 id. 446.

⁴ 10 John. 85.

⁵ 2 R. S. 441. §§ 80, 82. 3 id. (Banks' 5th ed.) 740, §§ 101, 103.

⁶ 2 Wend. 446.

⁷ 10 Wend. 128.

⁸ 1 Hill, 279. 6 Nev. and Man. 736.

⁹ 2 R. S. 739, § 13. Id. 749, § 47. 3 id. (Banks' 5th ed.) 1033, § 15. Id. 1043, § 54. Per Parker J. in *Hill v. Haynes*, Ms. case.

of the *teste*, was bound by it upon a levy made by the sheriff at any time before its return, and this, notwithstanding they had been sold to purchasers ignorant of the execution, and who paid full value.¹ The New York Revised Statutes have changed the rule, by providing that "goods and chattels situated within the jurisdiction of the officer to whom an execution shall be delivered, shall be bound only from the time of the delivery of the same to be executed;"² and that "the title of any purchaser in good faith, of any goods or chattels acquired prior to the actual levy of any execution, without notice of such execution being issued, shall not be divested by the fact that such execution had been delivered to an officer to be executed, before such purchase was made."³ It will be seen that this last provision is intended for the protection of *bona fide* purchasers only, and is not in conflict with the first one, that goods shall be bound only from the delivery of the execution. The one has reference to the rights of the party, and all persons except *bona fide* purchasers, and the other to those of purchasers in good faith. From the moment an execution is delivered to a sheriff, the goods of the defendant are liable, until its return day, to be levied upon, whether in his hands, or those of any other person, except purchasers in good faith. And if one, without notice of the execution, should purchase them, paying value for them, the provision of the Revised Statutes would render the title of the purchaser valid and free from the lien. If, however, the purchaser should have notice of the execution, the goods would be bound by it, and his title would be divested by a levy. And if he should purchase after a levy, whether with or without notice of it, his title would be subject to it, and be divested by a sale by the sheriff.⁴ If the execution creditor directs the sheriff to keep his levy a secret, his execution becomes dormant, and a subsequent *bona fide* purchaser will hold the goods;⁵ otherwise, if he simply directs the officer not to make his business public.⁶

§ 674. A purchase of goods, made for the purpose of keeping them out of the reach of an execution, is fraudulent, and wherever it can be shown, it will protect an officer in pursuing and levying upon them although in the actual possession of the purchaser, and notwithstanding the sale was made before the execution was issued. The mere knowledge by the purchaser that there is a judgment

¹ 12 John. 406. 11 Wend. 550.

⁴ 11 Wend. 548.

² 2 R. S. 365, § 13. 3 id. (Banks' 5th ed.) 644.

⁵ 16 Barb. 585.

³ Id. § 17, &c. (Banks' 5th ed.) 645. 5

⁶ 11 Wend. 548.

Denio, 619.

against the vendor is not sufficient to show it fraudulent; but if he knows of the judgment and makes the purchase with a view or purpose to keep the property out of the reach of an execution either issued or to be issued thereon, it will be fraudulent and void as against it, notwithstanding he pays a full price for it.¹ But a debtor may sell property to a creditor in payment of a debt, at a fair valuation, even if the debt is not yet matured.²

§ 675. Although the property of a defendant is, as between him and the plaintiff, only liable to an execution from the time of its delivery for service, yet that liability is a lien until levy, except as to one who, between the delivery and levy, becomes a *bona fide* purchaser or mortgagee without notice;³ and the levy, especially as against such a purchaser, must be an actual one and sufficient to constitute the officer a trespasser were it not for his process.⁴ When the levy is made, the lien, as it regards the parties to the action and all persons except purchasers without notice and for value, relates back to the time the sheriff received the execution.⁵ If the sheriff omits to make a levy until after the return day of the execution, the right to levy is thereby lost. If he make a levy before the return day he may not sell the property afterward.⁶

§ 676. Prior to the Revised Statutes, it was held that if two executions were delivered to a sheriff and he sold under the junior execution, the sale under it conferred a good title upon the purchaser;⁷ and if the sheriff *had paid over* the proceeds of the sale to the plaintiff in that execution, the only remedy of the plaintiff in the senior execution would have been against the sheriff. If the two executions were in the hands of the same person, the plaintiff's remedy would be perfect, for the officer should have paid the moneys raised from the sale upon the older lien. If, however, the executions were in the hands of different persons, as the sheriff and a deputy, or two different deputies, the liability of the sheriff would depend upon the question whether there had been negligence in not making the levy and sale upon the senior execution. While

¹ 8 John. 446. 12 id. 320. 18 Wend. 446. 31 id. 120. ⁵ Denio, 203. 29 N. Y. 471. 30 Ill. 353. See also 42 Barb. 98. Id. 171. Id. 300.

² 34 N. Y. 386.

³ 5 Denio, 619, 625. Id. 198. 5 Abb. 458. In Iowa there is no lien till the levy. 16 Iowa, 234; also in Minnesota, 3 Minn. 277. ⁴ Supra, note 3. 12 John. 407. 2 Eq. Cas. Ab. 381. 4 East. 536. 4 Cowen, 461. ⁶ Id. 2 Caines, 243. 9 John. 132. 13 id. 255. 17 id. 116. But see *Infra*. § 1584. ⁷ 1 Ld. Raym. 252. 4 East, 523. 12 John. 164. Id. 403.

the proceeds remained in the sheriff's hands, their application would be under the control of the court.¹

§ 677. The Revised Statutes have substantially affirmed the doctrine previously established. They provide that the property of the defendant in an execution shall be bound only from the time of its delivery to the officer, and that "If there be several executions issued out of a court of record against the same defendant, that which shall have first been delivered to an officer to be executed shall have preference, notwithstanding a levy may be first made under another execution; but if a levy and sale of any goods and chattels shall have been made under such other execution, before an actual levy under the execution first delivered, such goods and chattels shall not be levied upon or sold by virtue of such first execution;" and "If there be one or more executions, and one or more attachments against the property of the same defendant, or if there be several attachments, the same rule prescribed in the last section shall prevail in determining the preference of such execution or attachment."² The policy of the law is, while regarding the rights of the several plaintiffs as far as practicable, to protect the purchaser at the sale. Under the first of these sections it is held that, although the sale on the second execution is valid, and no sale can be afterward had on the one first delivered, yet in making a disposition of the proceeds, the officer must be governed by the priority in the delivery of the executions to him, unless the prior ones are dormant as to the subsequent ones.³

§ 678. The statute further provides that "Any execution or attachment issued out of any court *not being a court of record*, if actually levied, shall have preference over any other execution issued out of any court whether of record or not which shall not have been previously levied.⁴ This rule reaches a great variety of cases where there are several executions or attachments in the hands of different officers, all of which have been issued from a justice's court, or some of which may have been issued from such a court and some from a court of record. In such cases the first levy is the superior lien. If, after a levy by a constable, a deputy sheriff levies on the same property and sells it on an execution against the same debtor, for

¹ 4 Cowen, 461. 18 John. 311.

² 2 R. S. 365, §§ 14, 15, 3 id. (Banks' 5th ed.) 645. 2 Coms. 451.

³ 2 Coms. 457. 5 Bosw. 535, &c. See 5 Denio, 198. 5 Barb. 385. 5 Cowen, 390.

⁴ 2 R. S. 636, § 16. 3 id. (Banks' 5th ed.) 645.

enough to satisfy the prior one, the deputy is liable to the constable for the amount of his execution.¹

§ 679. A similar rule has been established in relation to any seizure of property by virtue of the law, as for a tax, distress, damage feasant or any similar process. As soon as it is seized it is reduced into the *custody of the law*, and then obtains a preference to any execution whether issued before or afterward, upon which no levy has been made.²

§ 680. Where the common law or statute gives a right or declares any act to be an injury to another, the person entitled to the right, or suffering the injury has a remedy. Prior to the New York Code of Procedure, if there were no specific form of action adapted to secure it, it was attainable by a special action of trespass on the case. Now, all these cases, in that state, have their remedy by civil action. Cases, however, are of frequent occurrence, which are not within the jurisdiction of a justice's court, although the amount of damages claimed does not exceed two hundred dollars. The language of the section limiting the jurisdiction of a justice is very explicit; "Justices of the peace shall have jurisdiction in the following cases, and *no other*." The subdivisions which comprehend the class of cases formerly remediable by actions of trespass on the case, is equally distinct: "An action for damages for injury to rights pertaining to the person, or to personal or real property, or for taking, detaining or injuring personal property," and "an action for damages for fraud in the sale, purchase or exchange of personal property."³ These clauses seem, by their terms, to exclude a variety of cases besides actions for "assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation or seduction," excluded by the next section. Among them are actions for escapes, false return, official negligence, where they are not brought upon contract, and frauds in recommending third persons in order to give them credit, and a variety of other wrongs where the plaintiff is clearly entitled to relief. These cannot, without violence to language, be deemed injuries to rights pertaining to the person, or to personal or real property. And, in confirmation of this position, are two decisions, the one of which holds that a justice's court has not jurisdiction of an action against a sheriff for not returning an execution,⁴ and the other, that it has not jurisdiction of one against a justice for a false return.⁵ So, also, it was held, in

¹ 19 Barb. 412.

² 4 East, 545. Show. 173.

³ Code, § 53.

⁴ 6 Duer, 697.

⁵ 14 How. Pr. R. 327.

another case, that justices have not jurisdiction of actions on the case for fraud in obtaining a judgment.¹ These cases were all prior to the amendment by which the subdivision was made to read as above; but it is not yet decided whether these amendments have varied the rule in the respects embraced by the decisions.²

§ 681. A false affirmation as to the solvency of a third person, by which he was enabled to purchase goods upon credit, in order to render the party liable who makes it, must be shown to have been made corruptly and with intent to deceive.³ If one made it in good faith, and believing it was true, although he professed to speak from his own knowledge, no action lies, and his expressions must be understood according to the *subject*, which is the credit of the third person, and which is matter of opinion.⁴ But when the agent of an owner of land, made statements so minutely descriptive of the land, that on their face they clearly imported a personal knowledge of the facts, and were not materially qualified by a reference to any other person as the source of information, it was held that his principal was liable for fraud, the court saying "they could not be honestly made, when he had not the slightest knowledge of the subject," and that if the statements "were made with an intent that he (plaintiff) should rely upon them, and he did rely upon them, it was as much a fraud as if they were known to be untrue."⁵ A similar rule would, doubtless, apply to similar statements as to the solvency of a third person. Where the intention is to deceive, the false representation may exist as well in a suppression of the truth as the assertion of a falsehood, and it need not be made with intent to deceive and defraud any particular person, if it appear that it was to afford the third party a false credit, and that by means of it the plaintiff was defrauded.⁶

§ 682. The following cases illustrate the strictness of the rule by which persons are held responsible for damages occasioned by false representations. One who held judgments against B. wrote to his friend in New York: "Mr. B. is going to your place to buy goods. He has been a merchant some years at A.; has bought his goods at Buffalo, Utica and elsewhere, heretofore. Any assistance you can give him by way of buying would be thankfully acknowledged, he being an acquaintance of mine." The friend, in consequence, intro-

¹ 40 Barb. 512.

² See 40 Barb. 520, 521.

³ 7 Wend. 9. 11 id. 374. 3 Kern. 322.
31 N. Y. 518.

⁴ 2 East, 92. 2 Kent, 488, 490. 44 Barb. 498.

⁵ 21 N. Y. 238. See 36 Barb. 377. 42 Mo. 18. 14 Mich. 109. 27 Ind. 4.

⁶ 7 Wend. 9. 38 Barb. 445. 25 id. 578.

duced B. to the plaintiff, who sold him goods on credit. The writer of the letter was held responsible for a false recommendation, on the ground of his *suppression of the fact* that he held judgments at the time against B., and knew he must fail, and that he was bound to disclose all his knowledge when he wrote such a letter introducing him.¹ In another case the defendant gave to A. a general certificate, stating that he was honest, industrious, reputable, of good morals and habits, and in his opinion he would honorably endeavor faithfully to perform every engagement he should make in any matter of business or credit; on the strength of which A. obtained credit. The defendant was held liable upon its being shown that the certificate was false, and he was not permitted to show that the certificate was given for a particular purpose other than the one for which it was used. It was, however, held that the defendant might, if he could, have shown that he believed the allegations contained in the certificate, and was the dupe of A.² Where a party, in bad faith, and with a view of inducing others to credit a merchant, represented that he has examined into his affairs and considers him solvent and worthy of credit, and that he is going on well, when such merchant is, in fact, insolvent, and the party making the representations has not investigated his affairs, and knows nothing of his business condition, except that he is largely indebted, a portion being owed to himself; it was held that he was liable to one who had trusted the merchant on the faith of these representations.³

§ 683. In cases of breach of trust by one's attorney, agent, servant, surgeon, physician, tailor, smith, barber or other person exercising a trade or profession, acting ignorantly, carelessly or maliciously in their several undertakings, by which an injury is done to the plaintiff's person or property, he is not obliged to resort to his action upon their contract, but may bring one directly for their wrongful or negligent act.⁴ But where an action for neglect is not maintainable without referring to a contract, and proving that, the action must be brought on the contract itself, and not for the wrong.⁵ A servant or attorney is bound only to diligence and fidelity, and is not accountable for want of skill. Gross negligence or ignorance must be shown in order to render an attorney liable. If he acts to the best of his skill, and with

¹ 7 Wend. 9.

² 14 Wend. 126.

³ 3 Kern. 322.

⁴ 1 Bouv. Inst. 403, § 1005. 3 Stark. R. 6. 5 J. Scott, N. S. 236. 8 East, 352. 2 Wils. 359.

⁵ 7 Hill, 101.

a reasonable degree of attention, he is not responsible.¹ In regard to dealings between himself and his client, the highest degree of fairness and good faith is expected and exacted.²

§ 684. A public officer not acting in a judicial capacity is answerable for neglect of duty, or abuse of his trust, to any one who is injured thereby.³ Thus, if a sheriff or constable neglect to serve process to him directed and delivered for service, which is not bad upon its face,⁴ or sells property on an execution at a grossly inadequate price,⁵ or suffers an escape on civil process,⁶ or makes a false return;⁷ or if a justice, when properly applied to, refuses to issue process or makes a false return to an appeal from a judgment rendered before him;⁸ or a county treasurer refuses to pay over money without cause,⁹ each is liable to the party injured. If, however, the party consents to the neglect or delay, the officer is not liable.¹⁰ In New York, under their statute, an overseer of highways is not liable to a person for an injury which he has sustained in consequence of his neglect to keep a bridge in repair; nor are commissioners of highways, if they have no funds, and probably not even if they have.¹¹

§ 685. An escape presupposes an *arrest*. This, strictly speaking, is the actual corporal seizure of the defendant. Technically, however, the touching of his person is not necessary. It is sufficient if the prisoner be within the power of the officer and submit to the arrest,¹² or where the officer goes into his room, tells him that he arrests him, and locks the door.¹³ So it is sufficient if the intention and the power to make an arrest co-exist, and are made known to the party, who does not resist.¹⁴ It is an arrest if one having authority to arrest lays his hand upon the person, for the purpose of arresting him, though he does not hold or stop him.¹⁵

§ 686. In making an arrest, a regular officer within his official district is not bound to show his warrant, though it be demanded,¹⁶ but a special deputy must show his process, or the party arrested may

¹ Ante, § 290. 2 Wils. 325. 4 Bur. 2060. ⁷ 5 Wend. 309. 11 Ad. & E. 539. 4 id.
³ Barn. & Cress. 738. 3 Camp. 19. 1 N. S. 566.
 Bouv. Inst. 403, §§ 1004, 1005. 27 How. ⁸ 1 Denio, 589, 595. 31 How. Pr. R.
 Pr. 212. 12 Cl. & Fin. 98. 13 Cal. 203. 154. 11 Wend. 545.
 29 Ind. 435. 28 Texas, 425. ⁹ 2 Cowen, 444.
² 17 Ill. 148. 18 Texas, 135. ¹⁰ 1 Head. 377.
³ 24 Iowa, 336. 18 id 153. ¹¹ 17 John. 439. 29 N. Y. 297.
⁴ 38 Barb. 18. 39 id. 69. 4 Bosw. 649. ¹² 1 Wend. 210.
 4 Sneed. 577. 10 Wis. 101. ¹³ 5 Co. 92. Hob. 62a.
⁵ 1 Bos. & Pul. 359, 360, note a. 3 Camp. ¹⁴ 18 N. H., 198.
 521. ¹⁵ 3 Allen, 495.
⁶ 35 Barb. 514. 5 Seld. 208. 4 Bosw. 384. ¹⁶ 10 Wend. 514. 2 Hill, 86.

lawfully resist him.¹ Where a party is apprehended in the commission of an offense, or upon fresh pursuit afterward, notice of the official character of the person making the arrest, or of the cause of the arrest, is not then necessary.² Where, however, a party submits to the arrest of a regular officer, the latter is bound afterward to give him the substance of the process, in order to enable him to take such legal measures as he desires to obtain his discharge, if he asks for it.³

§ 687. For the service of civil process, every man's dwelling-house is inviolable, or as the early writers express it, is his *castle*, and an officer has no right to break its outer door or window, to open it if shut, to lift a latch in order to enter it, or to enter against the owner's command in order to arrest him or to levy upon his property. And it makes no difference whether the owner be at home or absent. The privilege is intended for the protection of himself and his family, and is therefore confined to the dwelling-house occupied by them, and does not extend to a barn, store, shop or warehouse disconnected from the dwelling-house, and forming no part thereof.⁴

§ 688. Where a sheriff, with process, opens the outer door of the defendant, for the purpose of arresting him or levying upon his property, and there does arrest him, or make a levy, the arrest and levy are void, and he is himself liable for the unlawful entry.⁵ But where the sheriff obtains admittance into a dwelling-house without a wrongful entry, he may break an inner door in order to arrest a party or make a levy.⁶ This was held where the front door was generally fastened, and the usual entrance was by the back door, which the sheriff found open in the night, and entered, and then broke an inner door and arrested the defendant.⁷ And where one let all his house but an inner room, which he occupied, and the officer having obtained peaceable admission into the house, broke open the door of that room to arrest him, the arrest was held good.⁸

§ 689. For the purposes of protection against arrest in his dwelling-house, a man's permanent boarders or lodgers are regarded as members of his family. But his house is no protection to one who has gone there merely to avoid the service of process, or a stranger.⁹ To

¹ 24 Wend. 418. 10 id. 514.

² 27 Cal. 572. 10 Wend. 300.

³ 2 Hill, 86.

⁴ 1 Hill, 336. 4 id. 437. 6 id. 597. 16 John. 287. 13 Mass. 520. Crocker on Sheriffs, § 314. Sewell on id. 111. Impey on id. 75.

⁵ 1 Hill, 336. 4 id. 437. Also 20 Barb. 16.

⁶ 16 John 287.

⁷ 17 id. 127.

⁸ 5 John. 352. See also Lofft, 374. Cowp. 1. 2 Moore, 207.

⁹ 5 Coke, 91. 16 John. 287. 13 Mass. 520.

arrest such a one, an officer may break the outer door if admission be refused him, or, if he have obtained admission, may break an inner door. He does it, however, at his peril. If the person against whom he has process is there, he is justified, but if he is not, he is liable to the householder. In an action against him, therefore, he must aver and prove that the person to be arrested was actually in the house, or the room, as the case may be.¹ Where he has process against the householder, and has obtained lawful admission into the house, he may, after a demand and refusal to enter an inner door to make the arrest, break it, although it subsequently appears that the householder was not within.²

§ 690. After an officer has arrested one against whom he has process, if his prisoner escape from him, he may break the outer door of his own or any other dwelling-house, in order to retake him; if, after making known his business and demanding admission, it is refused to him. And if he had lawfully made the arrest in the prisoner's house, and he should then be thrust out of it, he may, upon a refusal to permit him to come in, return, with such assistance as may be necessary to enter and retake his prisoner.³

§ 691. An *escape* is either negligent or voluntary; *negligent* where the prisoner escapes without the consent of the officer; and *voluntary* where he permits him to go at large.⁴ After a negligent escape, the officer may retake the prisoner, even upon Sunday,⁵ and such recapture, or a voluntary return into his custody, before an action against the sheriff for the escape, is a good defense to him.⁶ Where a defendant is arrested upon an execution against his body, which is technically called *final process*, if he permits him to escape, he cannot retake him upon the same process, and would be liable to false imprisonment if he should do so.⁷ The rule is different, however, in regard to process by which an action is commenced, or which is issued during its progress, for the defendant's arrest. This is technically called *mesne*, or middle process, it originally being process which was issued between the commencement of an action and the judgment. Where a sheriff has suffered his prisoner to escape voluntarily, on *mesne* process, he may retake him.⁸ A rescue from the officer of a

¹ 6 Taunt. 246.

² 3 Bos. and Pul. 223.

³ 10 Wend. 300.

⁴ Grah. Pr. 148. 4 John. 45. 10 id. 549.

6 Abbott, 206.

⁵ 6 Mod. 231. 6 Abbott, 206. 2 John.

Cas. 3.

⁶ 6 Cowen, 732. 2 R. S. 435, § 48. 3 id.

(Banks' 5th ed.) 734, § 69. 5 Duer, 118.

⁷ 15 John. 256. 3 Coms. 331.

⁸ 2 Term R. 172 to 177. 10 Wend. 514.

prisoner arrested on *mesne* process, by superior force, is a good defense to him in an action for escape. It seems, however, it is not upon an execution.¹ An illegal discharge by the officer, is a negligent escape, and the defendant may be rearrested on the same or another execution.² But if a debtor is taken from the jail or liberated by virtue of a valid legal process, it is not an escape.³

§ 692. After an escape has happened, the consent of the plaintiff in the action will not discharge the officer making the arrest, unless it be made upon a valid consideration.⁴ The verbal consent of the plaintiff's attorney will not be a defense to an action, for allowing an escape.⁵

§ 693. The plaintiff in an action for an escape can recover no more than he could have recovered in the original action, and no more than he has actually lost in consequence thereof,⁶ and if he, after learning of the escape, relinquish any security which he held for his debt, the officer may show this in mitigation of damages.⁷ If the escape was from an arrest on *mesne* process, and the plaintiff can recover his claim against another party, this is a ground of deduction from the damages.⁸ And also in such a case, if the defendant was insolvent, the plaintiff can recover only his actual damages.⁹ But if the escape was from an arrest in execution, the plaintiff recovers the amount of his judgment, the defendant's insolvency not being a defense, either in bar, or in mitigation of the damages.¹⁰

[§ 693a.] If the judgment or the process on which the arrest was made was void, that fact, if proved, will defeat the action for the escape.¹¹ But that either the judgment or execution was irregular or erroneous is no defense.¹²

§ 694. If after a voluntary escape the officer is obliged to pay the plaintiff the amount of his debt, he cannot maintain an action against the defendant for the money paid.¹³

§ 695. Where a public officer is bound in the business of his office to make a return, an action lies against him in case his return is false.¹⁴ It is a common one against a justice of the peace, for making

¹ Cro. Jac. 419.

² 7 Ind. 582.

³ 1 Keyes, 521.

⁴ 7 Cowen, 274.

⁵ 1 Bosw. 349. See *Infra*, § 1645.

⁶ 1 John. 215.

⁷ 7 John. 189.

⁸ Gra. Pr. 149.

⁹ 17 Wend. 543. 26 Barb. 256. 4 Bos. 391.

¹⁰ 5 Seld. 208. 35 Barb. 514. 23 How. Pr. R. 129.

¹¹ 31 N. Y. 90. 28 How. Pr. R. 225. 6 Bosw. 25. 20 Ill. 291. 24 id. 553. See 13 Ohio N. S. 182.

¹² 15 John. 152. 3 Coms. 332. 4 Bosw. 384.

¹³ 8 East, 171. Gra. Pr. 149.

¹⁴ *Supra*, § 684.

a false return upon an appeal from a judgment rendered by him, and against sheriffs for false returns to process. The false return, however, must have caused an injury to the plaintiff, or an action will not be sustained. If, therefore, the return be untrue, yet if the fact had been truly stated it would have produced the same result as the return made, the officer will not be liable for damages.¹ In the case of a justice, he acts ministerially in making return to an appeal, and is responsible for any error which damages the party, however pure his motives, and without proving that his return was either deceitfully, fraudulently, willfully, knowingly or intentionally made.²

§ 696. A sheriff or constable who levies on goods by virtue of an execution, and returns it *nulla bona*, assumes the responsibility of proving the title out of the defendant in the property levied upon. The fact of the levy is *prima facie* evidence against the officer that there was property of the defendant, and he must overcome it by proof that there was not.³

§ 697. A judicial officer is not liable in a civil action for a mistake in law made when he has jurisdiction of the subject-matter in relation to which he is acting,⁴ nor for misconduct as a judge, notwithstanding his conduct be corrupt.⁵ This is the rule in New York, but in Iowa, Missouri and Illinois, it is otherwise, a judicial officer being liable in those states, both civilly and criminally, for exercising his judicial functions willfully, maliciously or corruptly.⁶ When a justice on a complaint that the plaintiff "on the first day of the week, called Sunday, circulated a memorial to the legislature," issued a warrant against him under the statute entitled "Of the observance of Sunday,"⁷ had him arrested and imposed a fine upon him, it not appearing what the purport of the petition was, the supreme court held that he was not liable to the plaintiff.⁸

§ 698. In another case, a justice rendered a judgment against the defendant in an action tried before him; the defendant wishing to bring an appeal, wrote to him to send him the exact amount of the judgment. The justice negligently replied, giving the amount at \$27.95, and the defendant in the action acted upon his information

¹ 1 Wend. 48. 9 id. 298. 11 Ad. & E. 117. 12 Barb. 165. 24 id. 422. 35 id. 539. 4 id. N. S. 566. 412.

² 1 Denio, 589.

³ 3 Greene (Iowa), 584. 14 Iowa, 51

⁴ 5 Wend. 309. 23 How. Pr. R. 127.

18 id. 153. 20 Mo. 22. 22 Ill. 100. 3.

⁵ 8 Cowen, 178. 11 Wend. 545. Supra, id. 318.

§ 660. 14 Iowa, 510.

⁷ 1 R. S. 675, § 70. 2 id. (Banks' 5th

⁸ 8 Cowen, 178. 1 Denio, 595. 3 id. ed.) 936, § 67.

²¹ Wend. 552.

and prepared an appeal bond with reference to it. The sum was erroneously stated, and in consequence the appeal was quashed for the variance, and the defendant thereby lost his remedy and was subjected to expense. The court held that the act of the justice was not within the scope of his official duties, and neither a judicial nor ministerial act, but only a friendly office for the gratuitous performing of which, negligently, but without fraud or evil intent, he was not answerable.¹ Since this decision, a statute has been passed, requiring a justice who has rendered a judgment by default, and in the absence of the party against whom it is rendered, on the demand of any person interested therein, to give him a transcript of the judgment, together with a copy of the process, pleadings and proofs in the cause, if in writing, or the substance thereof, if not in writing, or such parts thereof as may be required, on his being paid therefor twenty-five cents for such transcript, and six cents a folio for the residue thereof.²

§ 699. In addition to the remedy which one has for injuries to his real estate or growing crops from animals or inanimate chattels of another, he has a remedy by *distress*. The remedy existed at common law, but it only authorized the detention of the thing distrained as a pledge, and gave the distrainer no power to sell it.³ The remedy in New York has been rendered more available by statute, and by a compliance with its provisions the property distrained may be sold in satisfaction of the damages sustained.⁴ There are several rules to be observed in relation to this remedy. 1. The chattels distrained must be taken while doing the damage. The proceeding is for this reason termed distress *damage feasant*, i. e. *doing damage*. Thus if the chattels be inanimate, as stacks, nets, oars, timber, &c., placed upon the distrainer's premises, he must distrain upon them before they are removed, and if animals, he must take them while actually upon his land; for if once off from it, although they escape while he is in pursuit of them, he cannot distrain them. 2. They can only be distrained for the injury they are doing, and if they have done damage and gone off and returned and are again doing damage, they can only be distrained for the damage done the second time. 3. One beast, fowl or thing, cannot be distrained for damage done by another at the same time, though in the same field and belonging to the same owner. 4. If tender of

¹ 11 Wend. 545.

² Woodf. Land. & Ten. 627. 3 Wool.

³ Laws of 1841, ch. 141. 3 R. S. Lec. 125.

(Banks' 5th ed.) 458, § 182.

⁴ 2 R. S. 517. 3 id. (Banks' 5th ed.) 841.

amends for the injury done be made before the distress it cannot be made. 5. If the tender be made after the distress, but before the impounding of an animal distrained, the distrainer may not distrain it. 6. If the tender be made after the impounding, the tender must be sufficient to cover the distrainer's damages, as well as the expenses of impounding. 7. The distress may be made by night or by day.¹ 8. If cattle be distrained without a cause they may be rescued by their owner at any time before they are impounded, but after being impounded they cannot be rescued, although they may have been distrained without cause.² 9. The distress may be made by an agent or servant for and under the direction of his master.³

§ 700. The right to distrain chattels damage feasant does not depend upon the particular kind of injury done, or the place where it is committed. Accordingly it has been held that swine eating corn in the distrainer's barn were properly distrained.⁴ And where one has distrained chattels, he may at any stage of the proceedings before satisfaction is received for the damage he has sustained, relinquish them and resort to his action, the remedy by distress being merely cumulative, and the party having the right, if he chooses, to bring his action for his damages.⁵

§ 701. The statutory provisions in relation to distress are very explicit, and furnish directions for each step in the proceeding in all cases which will ordinarily occur, and as the remedy is a very convenient one to resort to, it has been deemed wise to copy them at length. They are as follows:⁶ “(§ 1.) When any distress shall be made of any beasts doing damage, the person distraining shall keep such beasts in some secure place other than the public pound, until his damages shall be appraised; and within twenty-four hours after such distress, unless the same was made on a Saturday, in which case, before the Tuesday morning thereafter, he shall apply to two fence-viewers of the town, to appraise the damage. (§ 2.) Such fence-viewers shall thereupon immediately repair to the place; and view the damage done; and they may take the evidence of any competent witnesses of the facts and circumstances necessary to enable them to ascertain the extent of such damage, for which purpose, either of them is hereby authorized to administer an oath to every such witness. (§ 3.) The said fence-viewers shall ascertain and

¹ Woodf. Land. & Ten. 627.

² 10 John. 258. 3 Bl. Com. 12.

³ 26 Iowa, 259.

⁴ 19 Wend. 498.

⁵ 15 John. 220. 18 Wend. 220. 3 Hill, 41.

⁶ 2 R. S. 517. 3 id. (Banks' 5th ed.) 841.

certify, under their hands, the amount of such damage, with their fees for their services; and if any dispute shall arise, touching the sufficiency of any fence around the premises, where such damage was done, the said fence-viewers may examine witnesses in relation thereto, and for that purpose may administer oaths to such witnesses, and they shall determine such dispute; which decision shall be conclusive. (§ 4.) Within twenty-four hours after the said damages shall be so appraised, unless the amount so ascertained, and the fees of the fence-viewers shall have been paid, the person making such distress, shall cause the beasts distrained to be put in the nearest pound in the same county, if there be one, there to remain until the same be sold as hereinafter directed, or until replevied according to law, or until the damages so certified, and the fees of the fence-viewers and pound-master, be paid; and he shall deliver the certificate of the fence-viewers to the keeper of such pound. The owner of such beasts may give them their feeding, without disturbance. (§ 5.) The pound-masters of the several cities and towns of this state, shall receive and keep the beasts so delivered to them, in the public pound, and unless the same shall be replevied, or discharged according to law, within six days, such pound-master shall sell such beasts, or so many of them as shall be necessary, at public vendue, giving forty-eight hours' notice of such sale, by advertisement, to be fixed up at such pound, and at the nearest public place. (§ 6.) From the proceeds of such sale, the pound-master may retain sufficient to pay the amount of his fees and his charges for keeping such beasts and the charges of such sale; and he shall pay to the person impounding such beasts the damages so certified, with the fees of the fence-viewers; and if there be any surplus, the same shall be paid to the owner of such beasts. If no owner appear within one year after such sale, and claim such surplus, the same shall be paid to the overseers of the poor of such city or town, for the use of the poor thereof. (§ 7.) Every pound-master with whom any beasts shall be impounded, shall discharge such beasts, on being paid. 1. The amount of the damages so certified by the fence-viewers; 2. The fees of the fence-viewers; 3. The fees of the pound-master, with his reasonable charges for feeding such beasts, if fed by him, not exceeding six cents for each beast, for every twenty-four hours. (§ 8.) When any person shall be authorized by law to distrain any inanimate goods or chattels doing damage, he shall keep the same in some safe and convenient place, until the damage shall be appraised, and the goods be sold or otherwise disposed of. (§ 9.) He shall apply to any two

fence-viewers of the town, to appraise the damages sustained by him; who shall proceed therein, in the same manner and with the same powers, as hereinbefore provided, with respect to cattle doing damage; and in addition, they shall estimate and certify the value of the property distrained. (§ 10.) The distrainer shall affix a notice in three public places of the town, for ten days, as follows: 1. Specifying therein the property distrained, and the amount of damages certified; 2. Requiring the owner of such property to redeem and remove the same, before the day therein appointed for the sale thereof; 3. Stating that such property will on some day, at least ten days from the day of the first posting thereof, be sold to pay such damages, and the costs and charges of the proceedings. (§ 11.) If the value of the property distrained, as certified by the appraisers, exceed fifty dollars, the distrainer shall publish a notice in the nearest newspaper, once in each week for four weeks, similar to that required in the last section, except that the time of sale shall be at least thirty days from the day of the first publication of such notice. (§ 12.) If the owner of such property be known to the distrainer, or if any person be known to him as claiming any interest in such property, and if such owner or person reside within the county, the distrainer shall also serve a copy of such notice within two days after the time of posting, or after the first day of the publication thereof, either personally on such owner or person, or in case of his absence from his usual or last place of residence, by leaving the same at such residence with a proper person. (§ 13.) If such goods and chattels be not removed, and if the damages so certified, with the fees of the appraisers and the expenses of such notice, be not paid at the time appointed in such notice for the sale, the distrainer shall apply to the sheriff of the county, or one of his deputies, or to any constable of the town, to sell such goods and chattels, and shall make and deliver to such officer, an affidavit showing his compliance with the provisions of this title, and the original certificate of the appraisers. (§ 14.) Such officer shall thereupon proceed and sell the goods and chattels so distrained, in the same manner as on executions against personal property in civil cases, and with the like authority and effect, and shall be entitled to the same fees for his services. (§ 15.) From the proceeds of such sale, such officer shall retain his own fees, and shall pay to the distrainer the amount of the damages so certified, and the expenses of such notices, and also all expenses that may have been necessarily incurred, in the safe keeping and preservation of such property; which expenses shall be ascertained and certified by

judge of the county courts, or by a justice of the peace of the county. (§ 16.) If any balance shall remain, such officer shall pay the same to the county treasurer, for the use of the owner of such property, or his legal representatives. (§ 17.) Upon the application of the owner of such property, or his representatives, to the court of common pleas [county court] of the county, and on due proof, by affidavits of such ownership, the said court shall order such balance to be paid to such owner, or his representatives, by the county treasurer, after deducting a commission of five per cent for receiving, keeping and paying over the same. (§ 18.) If upon such application, the court entertain any doubt of the ownership of such property, before ordering such balance to be paid over, they shall require the claimant to execute a bond to the people of this state, in a penalty at least double the amount of such balance, and with sureties to be approved by such court, conditioned that he will pay to any person, who, in an action on such bond, commenced within two years from its date, shall establish his right to such balance, or to any part thereof, the amount to which he shall show such right with interest. (§ 19.) Any person claiming such balance, or any part thereof, may prosecute such bond, in the name of the people of this state, on the relation of such person, who shall, in all respects be deemed the plaintiff therein, and be liable for the costs. If he establish his right to such balance, or any part thereof, in such action, he shall be entitled to recover such amount, with interest, as damages to be assessed for a breach of such condition, with costs of suit. The proceedings thereon shall be the same as in other actions on bonds, with conditions other than for the payment of money. But no judgment in favor of the defendants, shall be a bar to, or in any way affect, any action that may be brought on such bond, by any other person than the plaintiff against whom such judgment shall have been obtained. (§ 20.) When, by the provisions of any statute, any officer is authorized to distrain on any property, for any purpose whatever, and no special provision shall be otherwise made, he shall cause at least five days' notice of sale of such property to be given, by posting the same in three public places of the town, where such sale shall be made. (§ 21.) Before making any such sale, such officer shall also cause the property distrained, to be appraised by three disinterested freeholders of the town, on oath; and such appraisal, with an inventory of the property distrained, shall be certified by the appraisers in writing. (§ 22.) Within ten days after any such sale, the officer making the same shall file in the office of the clerk of the

town or city, where such sale was made. 1. His own affidavit, specifying the cause of such distress, and the amount of the penalty, tax, duty or other sum, for which the same was made; 2. Proof by affidavit, of the notice herein required, having been given; 3. The inventory and certificate of the appraisers: Which papers, when so filed, shall be presumptive evidence of the facts therein contained. (§ 23.) Unless the provisions of the last section are complied with, within the time therein required, such officer shall forfeit to the owner of the property sold, twenty-five dollars. (§ 24.) From the proceeds of any such sale, such officer shall be authorized to deduct and retain the expenses of such appraisal, certificate, notice, proof and affidavits, and of the filing the same, as herein required. And the residue of such proceeds, after satisfying the penalty, tax, duty or other sum, for which such sale was made, shall be paid within ten days after such sale, to the treasurer of the county, for the use of the owners of such property. (§ 25.) The same proceedings shall be had by such owner, to obtain the money so paid over, as are hereinbefore provided, in the case of distress on inanimate property doing damage, and the said provision shall apply in all respects to such moneys and such proceedings." This statute only applies to the owners of adjoining land.¹

[§ 701a.] A still further New York statute relative to animals trespassing is found, *supra*, section 533.

§ 702. The intention of the legislature, as clearly expressed in the statute, is that the damages sustained from animals distrained, must be ascertained before they are put into the pound.²

§ 703. It will be observed that the third section of the statute provides that if any dispute arise touching the sufficiency of the fence around the premises where the distress is made, the fence-viewers are to determine it, and their decision is conclusive. It may happen that, although the distrained animals have done an injury, the fences of the party distraining may be so in fault that the fence-viewers would not award or certify any damages therefor.³ The provision authorizing the examination of witnesses is frequently necessary where property has been wholly destroyed, or where fences have been thrown down or their appearance altered, before a view. In these cases the facts could not be ascertained by examination by the fence-viewers.

¹ 3 Hill, 38.

20 id. 428, 9. 19 Wendell, 499. *Infra*, §

² 2 John. 191. 10 id. 258. 13 id. 477. 705.

³ 10 John. 253, 258.

§ 704. The strictest regularity is necessary in making a distress, and the least departure from the requisite legal steps in taking and disposing of the property distrained will render the distrainer liable to an action. The distrainer would then be regarded as a *trespasser from the beginning*. This term is used to denote one who abuses a license given him by law.¹ Thus one who by authority of law takes the goods of another, as a sheriff by levy, and then willfully injures or destroys it, becomes a *trespasser from the beginning*, and the original levy which was lawful does not protect him. In order to constitute it, the authority must be by *act of law*, as one who abuses a license given him by another is not a trespasser from the beginning, and the abuse must be a positive act and not a neglect or omission.² One who, instead of passing along the sidewalk, stops on it in front of a man's house and uses abusive and insulting language toward him, abuses the privilege which the law gives him, and becomes a trespasser from the beginning;³ so does one who uses a distress, as riding or working a horse that has been distrained.⁴

[§ 704a.] A horse cannot be distrained, *damage feasant*, if there is a rider on him at the time, nor a horse and cart which are at the time in the actual possession, care and use of a party driving them;⁵ but a dog is not exempt though in the possession of its owner's son and servant, and then in his actual use.⁶

§ 705. If any step in the proceeding be taken in advance or omission of one which should precede it, the irregularity renders the whole of the proceedings void and the distrainer is a trespasser from the beginning, and in this case the owner may, in his action, recover the property or its value. A *neglect*, however, to deliver a distress on tender of amends,⁷ or an omission to have the damages appraised within twenty-four hours, will not render the distrainer a trespasser from the beginning.⁸

§ 706. Where several persons are jointly engaged in any wrongful act, although they may have contributed to it in different degrees, each is liable for the whole injury.⁹ Thus where several individuals act in concert in entering upon the plaintiff's lands and cutting and carrying away his timber, they are all liable, although they do not

¹ Supra, § 514.

² 13 John. 414. 5 Wend. 506. 19 id. 498. 4 Denio, 319.

³ 11 Barb. 390.

⁴ Cro. Jac. 147. 10 John. 258.

⁵ 6 Term R. 138. 12 Ad. & E. 649.

⁶ 1 Ad. & E. N. S. 679.

⁷ 8 Co. 146. 10 John. 369. 19 Wend. 498. Supra, § 702.

⁸ 19 Wend. 498.

⁹ 1 John. 290. 1 Kern. 128. 4 Bosw. 120.

participate as partners in the timber taken off.¹ So, where one sells a building on another's land, appoints a day for the purchaser to take it away, and promises to aid him in its removal, and it is removed in the vender's absence, he is still liable to an action of trespass.² In these actions against several trespassers, the damages are indivisible, and should the jury erroneously assess different amounts against the defendants, the plaintiff should have judgment against all for the highest sum found against any.³ One who knowingly receives a chattel which another has wrongfully taken and afterward, upon demand, refuses to deliver it to its owner, does not thereby become a joint trespasser, unless it was taken for his use in the first instance.⁴

§ 707. In the case of joint liability as wrong-doers, one action may be brought against all the parties jointly liable, or separate actions may be brought against each one, and each action may be prosecuted to judgment for the whole amount of damages, and its own costs. But where several judgments are obtained, the payment of the damages in one satisfies the damages in all the actions, but the costs of each particular action may be collected of the defendant against whom they are recovered.⁵ The same rules prevail in relation to the release of one of several defendants, which do in actions upon joint contracts, and the same precautions are necessary in the settlement of such actions.⁶ But unlike judgments upon joint contracts, if one defendant pays the whole recovery in an action for a wrong in which recoveries have been had against several, he cannot bring an action against his joint defendants for a contribution to the payment made by him, the law refusing to aid one wrong-doer to relieve himself by action against another.⁷

III. ACTIONS FOR A PENALTY NOT EXCEEDING TWO HUNDRED DOLLARS.

§ 708. By the Revised Statutes it was provided that, whenever a pecuniary penalty or forfeiture was specially granted by law to any person injured or aggrieved by any act or omission of another, he might sue for and recover the same in an action of debt or assumpsit; and if there were a forfeiture of any property, by an action of trover or other appropriate action.⁸ The change of the forms of action

¹ 10 Wend. 654.

⁶ Ante, § 212. 20 Iowa, 310.

² 12 Wend. 39.

⁷ 2 John. Ch. 131. 11 Paige, 18. 33

³ 1 Kern. 128. 4 Bosw. 120. 9 Pick. 555. Barb. 354.

⁴ 4 Barn. & Adol. 614.

⁸ 2 R. S. 480, § 1. 3 id. (Banks' 5th ed.)

⁵ 1 John. 290. 20 Iowa, 310. 4 Met. 783.

(Ky.) 330.

effected by the Code leaves the *right* as it existed before, and furnishes the remedy by civil action.¹

§ 709. The language of the original Code of Procedure limited the jurisdiction of justices to action upon penalties provided by statutes. It was then doubtful whether it extended to the case of penalties imposed by municipal corporations under their by-laws. An amendment has removed all question, and gives a justice jurisdiction of all actions for penalties where the amount does not exceed two hundred dollars.²

§ 710. There are several statutory provisions which it is necessary to observe in bringing an action for a penalty, viz:

1. The action must be tried in the county where the cause or some part thereof arose, * * * when it is for the recovery of a penalty or forfeiture imposed by statute, except that when it is imposed for an offense committed on a lake, river or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river or stream, and opposite to the place where the offense was committed; and if against a public officer or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command or in his aid, shall do anything touching the duties of such officer.³

2. Upon every process issued for the purpose of compelling the appearance of the defendant to any action for the recovery of any penalty or forfeiture, shall be endorsed a general reference to the statute by which such action is given, in the following form: "According to the provisions of the statute regulating the rate of interest on money," or "According to the provisions of the statute concerning sheriffs," as the case may require, or in some other general terms referring to such statute.⁴

3. Where any act is prohibited by law under a penalty not exceeding any given sum specified in such law, an action may be brought for such specified sum; and the jury or justice before whom the trial shall be had, shall award such sum so specified to the plaintiff, or such part thereof as shall be deemed proportioned to the offense.⁵

§ 711. The Revised Statutes provided a simple form of pleading in actions for penalties, as follows:⁶ "(§ 10.) In actions of debt brought to recover any penalty or forfeiture given by any statute, it

¹ Code, § 471.

² Code, § 53, sub. 3.

³ Code of Procedure, §§ 8 and 124.

⁴ 2 R. S. 481, § 7. 3 id. (Banks' 5th ed.) 784.

⁵ 2 R. S. 483, § 15. 3 id. (Bank' 5th ed.) 785, § 13.

⁶ 2 R. S. 482. 3 id. (Banks' 5th ed.) 784.

shall be sufficient, without setting forth the special matter, to allege in the declaration, that the defendant is indebted in the amount of such penalty or forfeiture, to the officer, person or body for whose use the same is given, whereby an action accrued according to the provisions of such statute, naming the subject-matter thereof, in the following form: 'According to the provisions of the statute concerning sheriff's,' naming the section, title and chapter of such statute, as the case may require, or in some other similar terms referring to such statute. (§ 11.) Whenever an action of assumpsit shall be brought for the recovery of any penalty given by any statute, it shall be sufficient, without setting forth the special matter, to allege in the declaration, that the defendant being indebted in the amount of such penalty, according to the provisions of such statute, referring to the same as prescribed in the last section, undertook and promised to pay the same. (§ 12.) If an action of trover be brought to recover any goods or other thing forfeited by the provisions of any statute, the declaration may allege that such goods or other things were forfeited according to the provisions of such statute, referring to the same as prescribed in the foregoing sections, and that the defendant converted the same to his own use, without setting forth the special matter. (§ 13.) To every declaration for a penalty or forfeiture, the defendant may plead the general issue that he owes nothing, or that he did not undertake and promise, as alleged in such declaration, or that he is not guilty of the premises charged, as the case may require, and may give in evidence under such plea, any special matter, which, if pleaded, would be a bar to such action, or discharge the defendant therefrom, in the same manner and with the like effect as if the same had been pleaded specially." The provisions of the Code of Procedure, abolishing "all the forms of pleading heretofore existing" (section 140), are modified by those of section 471, and therefore, in actions to recover penalties which are given by statute, it is sufficient to declare in the brief form provided in the above statutes.¹

§ 712. The following provision of the Revised Statutes relates to the rights of the parties: "In any suit for a penalty or forfeiture, brought by any person other than the party aggrieved, or other than any public officer, if a former recovery, or acquittal, or other bar to such action be pleaded, the plaintiff may reply that such recovery, acquittal or bar was had by covin and fraud; and if such replication

¹ 5 Abbott, 384. 6 id. 343. 22 Barb. 244.

be confessed or established, the plaintiff shall recover in such action, notwithstanding such plea."¹

§ 713. Upon executions issued upon judgments recovered for penalties or forfeitures incurred under the eleventh title of the twentieth chapter of part first of the Revised Statutes, entitled "Of fisheries, generally, &c.," it is the duty of the justice to endorse the cause for which the judgment was rendered, in which case if no goods or chattels can be found to satisfy it, it is the duty of the constable to commit the defendant to the jail of the county, and deliver to the keeper a certified copy of the execution and endorsement by virtue of which he shall detain him for a period not exceeding sixty days, without allowing him the benefit of the liberties.²

IV. AN ACTION COMMENCED BY ATTACHMENT OF PROPERTY *as provided by statute, where the debt or damages do not exceed two hundred dollars.*

§ 714. The cases in which the statutes authorize the issuing of attachment by justices of the peace, are as follows:

1. When, on the application of a creditor or his agent, it shall satisfactorily appear to the justice that a debtor has departed or is about to depart from the county where he last resided, with intent to defraud his creditors, or to avoid the service of any civil process, or that he keeps himself concealed with the like intent.³

2. Whenever an execution upon the judgment recovered could not be issued against the body of the defendant and the defendant shall reside out of the county, he may be proceeded against by attachment, returnable in not less than two nor more than four days from its date.⁴

3. Whenever it shall satisfactorily appear to the justice that the defendant is about to remove from the county any of his property with intent to defraud his creditor, or has assigned, disposed of or secreted, or is about to assign, dispose of, or secrete, any of his property with the like intent, whether he be a resident of this state or not.⁵

§ 715. It will be seen that the cases arising, under this clause of the section declaring the jurisdiction of a justice, must necessarily

¹ 2 R. S. 582, § 14. 3 id. (Banks' 5th ed.) 785, § 12.

² 2 R. S. 251, § 143. 3 id. (Banks' 5th ed.) 447, § 126.

³ 2 R. S. 230, § 26. 3 id. (Banks' 5th ed.) 430, § 24.

⁴ Laws of 1831, ch. 300, §§ 30, 31, 32, 33. 3 R. S. (Banks' 5th ed.) 462, §§ 212 to 214 inclusive.

⁵ Laws of 1831, ch. 300, § 34. 3 R. S. (Banks' 5th ed.) 462, § 216.

be actions arising upon debts previously existing, whether in judgment or on contract. An examination of the method of commencing an action by attachment comes more properly in a subsequent part of this work.

V. AN ACTION UPON A BOND *conditioned for the payment of money not exceeding two hundred dollars, though the penalty exceed that sum, the judgment to be given for the sum actually due. Where the payment shall be made by installments, an action may be brought for each installment as it shall become due.*¹

§ 716. A *bond* is an instrument under seal, or, as it is frequently termed in legal language, a *deed* by which the *obligor* or maker binds himself, his heirs, executors and administrators to pay a certain sum of money to another, called the *obligee*, either generally or at a particular time or times. If this be all it is called a *single* bond. This is not a very common instrument, a *penal bond* being the one generally employed. The latter consists of a bond binding the obligor to the payment of a certain sum which is called its *penalty* with a *condition* written beneath it that, if the obligor pays certain moneys, as therein expressed, or performs some particular act or service it shall be void, but otherwise shall remain in force. In case the condition be not performed, the bond is said to be forfeited. Under the ancient forms of action, when the obligor brought his action upon a bond he obtained judgment for the amount of the penalty, but if the condition was for the payment of money, was permitted only to collect the true amount owing by it. Under the present system the judgment should be given for the sum actually due.² If the principal is named in the body of the bond as one of its makers, still it need not be signed by him in order to make it binding on the sureties.³ A different rule prevails in California and Indiana.⁴ On the other hand, a surety who is not named in the body of the bond, is liable, if he signs it, to the same extent as though his name had been inserted.⁵ If the statute requires several names to a bond, and a less number sign and deliver it, it is valid as against them.⁶ A substantial compliance with a statute which requires a bond is all that is necessary to make it binding.⁷ In Wisconsin, the judgment on a penal bond is for the penalty, execution issuing for the amount really

¹ Code, § 53, subd. 5.

² Code, § 53, sub. 5. 19 How. Pr. R. 388. 18 Abbott, 260.

³ 2 Hill, 584. 42 Barb. 524.

⁴ 14 Cal. 421. 22 Ind. 399.

⁵ 16 N. Y. 439. 21 Barb. 218.

⁶ 37 Barb. 179.

⁷ 4 Wis. 96.

due.¹ The same rule also prevails in Illinois, where the judgment also provides that the whole may be satisfied upon the payment of the damages.²

VI. AN ACTION UPON A SURETY BOND, *taken by them, though the penalty or amount exceed two hundred dollars.*³

§ 717. The cases arising under this clause are not distinguishable in their general character from those under the fifth subdivision of the section. They only vary in amount. Surety bonds are required to be taken in a variety of proceedings, as upon issuing attachments, delivery of goods attached to claimants⁴ upon adjournments,⁵ and in various other cases.

VII. AN ACTION ON A JUDGMENT *rendered in a court of a justice of the peace, or of a justice's or other inferior court, in a city, where such action is not prohibited by section seventy-one of the Code of Procedure.*⁶

§ 718. The limitation contained in section 71 of the Code, is as follows: "No action on a judgment rendered by a justice of the peace, shall be brought in the same county within five years after its rendition, except in case of his death, resignation, incapacity to act, or removal from the county, or that the process was not personally served on the defendant, or on all the defendants, or in case of the death of some of the parties, or where the docket or record of such judgment is or shall have been lost or destroyed." Where the judgment comes under either of the exceptions, an action may be brought upon it, as when the justice rendering it is dead, has resigned, is incapable of serving as a justice, or has removed from the county, where the process was not personally served on the defendant, or on all the defendants, where some of the parties have died, or where the docket is lost or destroyed. If the judgment has been docketed in the county court, the leave of that court must be obtained before an action is brought thereon.⁷

VIII. TO TAKE AND ENTER JUDGMENT ON THE CONFESSION OF A DEFENDANT, *where the amount confessed shall not exceed five hundred*

¹ 10 Wis. 499.

² 25 Ill. 600. 27 id. 303.

³ Code, 53, sub. 6.

⁴ 2 R. S. 230, 231, §§ 29, 33. 3 id. (Banks' 5th ed.) 431, §§ 27, 31.

⁵ 2 R. S. 239, § 76. 3 id. (Banks' 5th ed.)

438, § 66.

⁶ Code, § 53, sub 7.

⁷ 32 Barb. 51.

*dollars, in the manner prescribed by article eight, title four, chapter two of part three of the Revised Statutes.*¹

§ 719. The provisions of the article referred to are as follows. The judgment may be entered with such stay of execution as may be agreed upon, upon compliance with the following requisites :

1. The defendant must personally appear before the justice.
2. The confession shall be in writing, signed by the defendant, and filed with the justice.

3. If the judgment be confessed, for a sum exceeding fifty dollars, the confession shall be accompanied by the affidavit of the defendant and plaintiff, stating that such defendant is honestly and justly indebted to the plaintiff in the sum named in such affidavit, over and above all just demands which he has against him, and that such confession is not made or taken with a view to defraud any creditor.² Every judgment confessed without a compliance with these requisites is void as against all persons, except a purchaser in good faith of any goods or chattels, lands or tenements under it, and except the defendant;³ and the statute provides a method of setting it aside by any creditor, by an application to the county judge.⁴ Further in regard to these judgments will be found *infra*, §§ 1542, &c.

IX. AN ACTION FOR DAMAGES FOR FRAUD *in the sale, purchase, or exchange of personal property, if the damages claimed do not exceed two hundred dollars.*⁵

§ 720. The subject of frauds in contracts generally, has been treated in a former part of this work.⁶ The party defrauded in a sale, purchase or exchange, may either bring his action upon the contract, or regard the contract annulled, and upon tendering what he has received from the other party, demand the money or thing paid for it, or he may bring an action directly for the injury he has sustained by the fraud. This action being for a wrong, when a judgment has been recovered in it, an execution may be issued against the body of the defendant.

X. ACTIONS MAY ALSO BE MAINTAINED TO RECOVER THE POSSESSION OF PERSONAL PROPERTY CLAIMED.⁷ This is substantially the old action of replevin, modified, to render it applicable to justices' courts, from

¹ Code, § 53, sub. 8.

² 2 R. S. 245, §§ 113, 114. 3 *id.* (Banks' 5th ed.) 443, §§ 104, 105.

³ *Id.* § 115 (106).

⁴ *Id.* §§ 116, 117 (107, 108).

⁵ Code, § 53, sub. 9.

⁶ *Ante*, §§ 76 to 80, §§ 231, 264.

⁷ Code, § 53, sub. 10.

the proceedings for "Claim and delivery of personal property," under the Code. The statute is given in full, *ante*, § 4.

§ 721. The fifty-fourth section of the Code of Procedure, in excluding from the jurisdiction of a justice of the peace actions where the title to real property shall come in question, renders an examination of the cases in which the title to real estate may come in question, necessary.

§ 722. A title is defined to be "the means whereby the owner of lands hath the just possession of his property."¹ There are several stages or degrees of title to lands, recognized by law. These are divided into a *naked possession*, a *right of possession*, a *mere right of property*, and a *mere right of property joined with actual possession*.² The lowest and most imperfect is the naked possession or actual occupation of the estate, which may happen in a variety of ways, without any right of possession to, or right of property in the subject of controversy. But in the meantime, until some act be done by the rightful owner, to divest such possession, though it be wrongful, it is *prima facie* evidence of legal title in the possessor, and if the defendant mean to do away with this evidence, by showing the right to be in another, he must interpose his title by his answer, and pursue the necessary steps to oust the justice of his jurisdiction. If the defendant do not do this, the justice will retain jurisdiction of the action, and the defendant will be precluded from urging the want of title in the plaintiff.³ Under the Code, the term "title" means "right of possession," and that only.⁴

§ 723. The Code of Procedure further provides as follows: "(§ 55.) In every action brought in a court of a justice of the peace, where the title to real property shall come in question, the defendant may, either with or without other matter of defense, set forth in his answer any matter showing that such title will come in question. Such answer shall be in writing, signed by the defendant or his attorney, and delivered to the justice. The justice shall thereupon countersign the same, and deliver it to the plaintiff. (§ 56.) At the time of answering, the defendant shall deliver to the justice a written undertaking, executed by at least one sufficient surety, and approved by the justice, to the effect that if the plaintiff shall within twenty days thereafter deposit with the justice a summons and complaint in an action in the supreme court for the same cause, the defendant will, within twenty

¹ 1 Ins. 345.

² 2 Bl. Com. 195 to 199.

³ See *Infra*, § 725.

⁴ 15 Abbott, 449. Also 6 Hill, 540.

days after such deposit, give an admission in writing of the service thereof. Where the defendant was arrested in the action before the justice, the undertaking shall further provide that he will, at all times, render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein. In case of failure to comply with the undertaking, the surety shall be liable, not exceeding one hundred dollars. (§ 57.) Upon the delivery of the undertaking to the justice, the action before him shall be discontinued, and each party shall pay his own costs. The costs so paid by either party shall be allowed to him, if he recover costs in the action to be brought for the same cause in the supreme court. If no such action be brought within thirty days after the delivery of the undertaking, the defendant's costs before the justice may be recovered of the plaintiff. (§ 58.) If the undertaking be not delivered to the justice, he shall have jurisdiction of the cause and shall proceed therein, and the defendant shall be precluded in his defense from drawing the title in question."¹ The plaintiff may then commence an action for the same cause in the supreme court. "(§ 59.) If, however, it appear on the trial, from the plaintiff's own showing, that the title to real property is in question, and such title shall be disputed by the defendant, the justice shall dismiss the action, and render judgment against the plaintiff for the costs."² "(§ 62.) If, in an action before a justice, the plaintiff have several causes of action, to one of which the defense of title to real property shall be interposed, and as to such cause the defendant shall answer and deliver an undertaking, as provided in sections 55 and 56, the justice shall discontinue the proceedings as to that cause, and the plaintiff may commence another action therefor in the supreme court. As to the other causes of action, the justice may continue his proceedings."³

§ 724. Under the former statute, the language of whose restriction was, "*where the title to land shall in any wise come in question*,"⁴ it was held that where either a public or private right of way was in question in the action, the suit must be dismissed, as involving a question of title, and the rule is the same under the Code.⁵ If the plaintiff seeks to recover on the ground of a naked possession of land, the defendant may disprove his possession. Such evidence does not draw the title in question, and the fact of possession is one which the

¹ 34 N. Y. 452.

² 43 Barb. 44.

³ See also, *infra*, §§ 1192, &c.

⁴ 2 R. S. 226, § 4, sub. 2.

⁵ 6 Wend. 465. 15 id. 338. 19 id. 373. 6 Hill, 342. 34 N. Y. 452. 1 E. D. Smith, 402. 30 How. Pr. R. 15. 27 Barb. 217. 2 id. 432.

justice may try.¹ The defendant contracted to sell land to the plaintiff, and gave him possession, reserving a right to re-enter for non-payment of the purchase money; upon a failure to pay he re-entered, and the plaintiff brought his action for an unlawful entry. Upon these facts appearing, it was held that the right of possession given to the plaintiff by the contract was a mere license, and, the only question turning upon its revocation, there was no title in question, and the justice might entertain jurisdiction of the case.² When, in an action to recover damages for the breach of an agreement to convey lands, the only issue on the pleadings is whether an inchoate right of dower in the wife of the defendant is a subsisting incumbrance, the title is not in issue.³ Nor is it where, in an action for injuries from the bite of a dog, the defendant alleges that the plaintiff, when injured, was in a place where he had no right to be;⁴ nor where the plaintiff sues to recover a tax paid by him, by mistake, on the defendant's land, the defendant's title to the land not being disputed on the trial.⁵ In the following cases it was held that the title was in issue: where the complaint alleged that the plaintiff was the assignee of a lessor of a lease in fee, that the defendant was the assignee of the lease, and that by the assignment, the plaintiff became seized in fee of the demised estate and the owner of the rent, for which the suit was brought, all the allegations being denied by the answer;⁶ where an action was brought substantially for waste, the complaint alleging a forfeiture, and praying possession;⁷ in an action where the defendant was charged with falsely representing himself to have title to real estate, and thereby obtaining money and goods, a denial being pleaded.⁸ See, also, *infra*, § 1194, &c.

§ 725. The justice cannot dismiss the action under section 59 of the Code, merely because the plaintiff gives in evidence a conveyance, as a deed or lease of the land, but only where the title is disputed.⁹ The giving such evidence need not necessarily show that the title of real property is in question, as where a lease is shown in order to maintain an action to recover rent, or a deed merely to show the performance of a condition precedent, or otherwise, incidentally. It is only where it appears from the plaintiff's showing that the title is in question, that the justice is bound to dismiss it under that section. And though

¹ 6 Hill, 537. 27 Barb. 214. 20 id. 311.
21 N. Y. 466.

² 7 Barb. 70, and refs.

³ 2 Duer, 622.

⁴ 3 E. D. Smith, 574.

⁵ 1 Hilton, 318.

⁶ 25 N. Y. 180.

⁷ 3 E. D. Smith, 235.

⁸ 1 Mich. 145.

⁹ 43 Barb. 44.

it be material for the plaintiff to show his title, yet if the defendant neither objects to the evidence, disputes its effect, nor moves for a dismissal of the cause, the title is not disputed within the meaning of the statute, and a judgment rendered for the plaintiff is valid.¹ This rule is the same in Minnesota.²

§ 726. Cases not infrequently arise where an action is brought for cutting or taking timber. If the action be brought for wrongfully cutting timber upon the plaintiff's land, and the defense is that the defendant did not cut it, or that he was authorized by the plaintiff to cut it, the justice may try the cause. But if the defense is that the plaintiff is not the owner of the land, or that the defendant has the title to it, or if, in an action for taking vines or timber from the plaintiff's possession, the defendant claims the right to do so because they were wrongfully cut upon his land, and were therefore his property, he must, in order to make his defense, show in his answer that the title to real estate will come in question, and oust the justice of his jurisdiction, or he will be precluded from the defense.³

§ 727. Where an action is brought for injuries done to the plaintiff's unoccupied lands, and the plaintiff's possession is disputed, he can only show a constructive possession to them, and this by proving his title. This involves a question of title which the justice cannot hear.⁴

§ 728. When title is in issue, the consent of the parties that the justice try the cause does not restore jurisdiction to him.⁵

[§ 728*a*.] As the statutes and practice of other states in regard to the question of title to real estate in justices' courts are diverse, they are not referred to in this treatise, except incidentally.

§ 729. Where in an action tried before a justice upon an account, the sum total of the accounts of both parties exceeded four hundred dollars, and the justice rendered a judgment for the balance, his judgment was held erroneous, and liable to be reversed, but not void.⁶

§ 730. In concluding this chapter it is proper to remark, that formerly an action against a corporation could not be brought before a justice of the peace.⁷ The rule is now changed. All actions cognizable before a justice may be brought by and against all persons

¹ 6 Hill, 271. Id. 44. Code, § 59. 25 N. Y. 180. 15 Barb. 96. 11 id. 390. 27 id. 214. 42 id. 353.

² 8 Minn. 387.

³ See 1 Code R. N. S. 172. 13 How. Pr. R. 325.

⁴ 8 Cowen, 115. 1 Wend. 466. 7 id. 495. 34 N. Y. 452.

⁵ 6 Wend. 465.

⁶ Code, § 54, sub. 4. 4 Denio, 370.

⁷ 5 John. 347. 7 id. 356.

who sue or are sued in their own right, and by and against all town and county officers, in their official character, and corporations, and they may be brought by, but not against executors and administrators.¹ In actions against corporations the Code of Procedure provides, that the summons, which is issued in the same manner as against natural persons, may be served by delivering a copy to the president or other head of the corporation, secretary, cashier, treasurer, or a director or managing agent thereof; but the service can be made in respect to a foreign corporation only when it has property within the state, or the cause of action arose therein.² A railroad corporation, whose road passes through two or more counties, may be sued before a justice in either county, provided the process can be served on the proper officer in such county.³ A foreign corporation, where it cannot be compelled to appear in a justice's court, may voluntarily appear and submit to its jurisdiction, where the court has jurisdiction of the subject-matter.⁴ A managing agent is one whose agency is general; a baggage master is not such an agent, nor a mere ticket seller.⁵ Railroads are, however, also required to file, in the clerk's offices of the respective counties through or into which their road runs, a designation of some person, in each of these counties, upon whom process issued by a justice of the peace may be served. If it is not filed, and there are no officers residing in the county on whom, by law, process may be served, the process may be served on any local superintendent of repairs, freight agent, agent to sell tickets, or station keeper of such corporation.⁶ Another statute (Laws of 1855, ch. 279; 2 R. S., Banks' 5th ed., 874) makes similar provisions.

¹ 2 R. S. 226, 236. §§ 5, 55. 3 id. ⁴ 2 E. D. Smith, 38.
(Banks' 5th ed.) 427, 436, §§ 2, 53. Code, ⁵ 5 How. Pr. R. 183. 6 id. 308. 8
§ 54, sub. 5. Laws of 1847, p. 646, Abbott, 427.

§ 45.

² Code, § 134. Laws of 1847, supra.

⁶ Laws of 1854, ch. 282, §§ 14, 15. 2
R. S. (Banks' 5th ed.) 697, §§ 79, 80.

³ 15 Barb. 650.

CHAPTER III.

OF THE TIME OF COMMENCING ACTIONS.

§ 731. The Code of Procedure repealed all the statutory provisions previously existing, in relation to the times for commencing actions, saving actions already commenced, and cases where the right of action had already accrued, and provided that civil actions can only be commenced within the periods prescribed therein, "except where, in special cases, a different limitation is prescribed by statute, and in the cases mentioned in section 73; but the objection that the action was not commenced within the time limited, can only be taken by answer."¹ Statutes of limitation, it is said, are to be strictly construed.²

§ 732. The limitations which relate to actions which may be commenced before a justice of the peace, are included in the following extracts from the Code of Procedure.

"Within *twenty years*: 1. An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States. 2. An action upon a sealed instrument."³

"Within *six years*: 1. An action upon a contract, obligation, or liability, express or implied, excepting those mentioned in section ninety. 2. An action upon a liability, created by statute, other than a penalty or forfeiture. 3. An action for trespass upon real property. 4. An action for taking, detaining or injuring, any goods or chattels, including actions for the specific recovery of personal property. 5. An action for criminal conversation, or for any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated. 6. An action for relief, on the ground of fraud, in cases which heretofore were solely cognizable by the court of chancery, the cause of action, in such case, not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud."⁴

"Within *three years*: 1. An action against a sheriff, coroner, or

¹ Code, §§ 73, 74.

² 35 Cal. 634.

³ Code, § 90.

⁴ Id. § 91.

constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution. But this section shall not apply to an action for an escape.

2. An action upon a statute, for a penalty or forfeiture, where action is given to the party aggrieved, or to such party and the people of this state, except when the statute imposing it prescribes a different limitation."¹

"Within *two years*: 1. An action for libel, slander, assault, battery, or false imprisonment. 2. An action upon a statute, for a forfeiture or penalty to the people of this state."²

"Within *one year*: An action against a sheriff, or other officer, for the escape of a prisoner, arrested or imprisoned on civil process."³

Within this statute, sub. 1. If a sheriff sells the property of B, upon an execution against A, the action therefor must be brought within three years.⁴

§ 733. In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side.⁵ This class of accounts is such as exist where each party makes charges against the other in his books, for property sold, services rendered, or money advanced. A payment by one party upon an account against him, and for which he has received a receipt, does not render the account a mutual one.⁶ Items in an account furnished within six years, will not draw after them items before that time, so as to save the account from the statute, unless it appear that there were also items on the other side. That is, if there be mutual accounts, or in other words, accounts where each party has charged items against the other; any one item, on either side, having accrued within six years before the action, will draw after it both accounts and take the case out of the statute, unless there appears a period of six years between any two of the consecutive items. If there is such a lapse between two consecutive charges, the account ceases to be an open one, as respects the prior items.⁷ In case there is a current account between two parties,

¹ Id. § 92.

² Id. § 93.

³ Id. § 94.

⁴ 18 Barb. 89.

⁵ Code, § 95.

⁶ 15 Wend. 554. 35 Cal. 122. 30 id.

126. Also cases *infra*, in note 2, next page.
4 Nevada, 101.

⁷ 1 Sand. 220. 2 id. 318. 4 id. 312. 20 Wend. 72. 7 id. 322. 9 id. 126. 17 Cal. 594.

if one party buys an open account against the other, from a third party, and holds it, without notice to, or recognition of its validity from the debtor, it does not form a part of the current account, and the statute runs against it in six years from the time it became due.¹ Items of debit for the contract price of work done, and credits for payments do not make a case of reciprocal demands.² And where all the items were paid except one, the validity of which was disputed, the statute runs against it.³ If a balance of accounts is struck, the statute begins to run on the balance from that time.⁴

§ 734. An action upon a statute for a penalty or forfeiture, given in whole or in part to any person who will prosecute for the same, must be commenced within one year after the commission of the offense; and if the action be not commenced within the year by a private party, it may be commenced within two years thereafter in behalf of the people of this state, by the attorney-general, or the district attorney of the county where the offense was committed.⁵

§ 735. The following general provisions as to the limitation of the time for commencing actions are extracted at length from the Code of Procedure, as they now provide for most of the questions which will arise in practice, and as they vary the rules formerly existing upon the subject in several important particulars. “(§ 99.) An action is commenced as to each defendant when the summons is served on him, or on a co-defendant, who is a joint contractor, or otherwise united in interest with him. An attempt to commence an action is deemed equivalent to the commencement thereof, within the meaning of this title when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants, or one of them usually or last resided: as if a corporation be defendant, to the sheriff or other officer of the county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business. But such an attempt must be followed by the first publication of the summons, or the service thereof within sixty days. (§ 100.) If, when the cause of action shall accrue against any person, he shall be out of the state, such action may be commenced within the terms herein respectively limited, after the return of such person into this state; and if, after such

¹ 4 Kern. 225.

² Id.

³ 5 Bosw. 226. 12 Ind. 174. 17 Cal.

⁴ 30 Cal. 126.

344.

⁵ Code, § 96.

cause of action shall have accrued, such person shall depart from and reside out of this state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action. (§ 101.) If a person entitled to bring an action" [mentioned in the extracts above given in section 732], "except for a penalty or forfeiture, or against a sheriff or other officer, for an escape, be at the time the cause of action accrued, either, 1, within the age of twenty-one years; or 2, insane; or 3, imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than his natural life; or 4, a married woman, the time of such disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought cannot be extended more than five years by any such disability, except infancy; nor can it be so extended in any case longer than one year after the disability ceases. (102.) If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives, after the expiration of that time, and within one year from his death. If a person against whom an action may be brought, die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his executors or administrator after the expiration of that time, and within one year after the issuing of letters testamentary or of administration. (§ 103.) When a person shall be an alien subject or citizen of a country at war with the United States, the time of the continuance of the war shall not be a part of the period limited for the commencement of the action. (§ 104.) If an action shall be commenced within the time prescribed therefor, and a judgment therein be reversed on appeal, the plaintiff, or, if he die and the cause of action survive, his heirs or representatives may commence a new action within one year after the reversal. (§ 105.) When the commencement of an action shall be stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition shall not be part of the time limited for the commencement of the action. (§ 106.) No person shall avail himself of a disability, unless it existed when his right of action accrued. (§ 107.) When two or more disabilities shall co-exist at the time the right of action accrues, the limitation shall not attach until they all be removed. (§ 108.) This title shall not affect actions to enforce the payment of bills, notes, or other evidences of debt issued by moneyed corporations, or

issued or put in circulation as money. (§ 109.) This title shall not affect actions against directors or stockholders of a moneyed corporation, or banking associations to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within six years after the discovery by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability was created. (§ 110.) No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest."

[§ 735*a*.] The acknowledgment required by this last (110th) section of the Code, when not express, and where a promise is to be raised by implication of law from the acknowledgment, must contain an unqualified, voluntary and direct admission of a present subsisting debt, which the party is liable and willing to pay. It must also be made to the creditor, or to some one acting in his behalf. If made to a stranger, it is not sufficient, nor is it if it is to pay when able, unless ability is proved.¹ Under a similar statute in England, it is held that this new promise must be signed by the party himself, and not by his agent, although duly authorized.² But this is doubtful; the contrary is implied in at least one case in New York.³ It is not necessary that it be *subscribed*. It is sufficient if the promissor's name appears anywhere therein, if written by him.⁴ If the debt is not sufficiently described in the writing, it may be identified by parol evidence.⁵ If the writing has been lost, parol evidence may be given, as in other similar cases, of its contents.⁶ It is sufficient evidence of a promise that the debtor includes the debt in question in his inventory of debts, sworn to by him, for the purpose of obtaining an insolvent's discharge; or in his assignment for the benefit of his creditors,⁷ or that he includes notes held by a creditor, in a statement of his affairs made at that creditor's request;⁸ or that a bank includes a certain amount as unclaimed deposits, belonging to A., in its statement of such matters made in pursuance of a statute.⁹ If the cause of action

¹ 4 Seld. 362. 5 id. 85. 18 N. Y., 560.

41 Barb. 495. 44 id. 489. 5 Bosw. 226.

² 2 Bing. N. C. 776. 3 Barn. & Ad. 399.

³ 10 Bosw. 122.

⁴ 3 J. Scott, N. S. 789. 15 Abbott, 377.

⁵ 41 Barb. 495. See 1 Daly, 186.

⁶ 7 Bing. 163.

⁷ 3 Cowen, 159. 28 How. Pr. R. 273.
18 Abbott, 305.

⁸ 3 J. Scott, N. S. 789.

⁹ 17 Wend. 514.

was barred before the adoption of the Code (although but few, if any, of such cases can now exist) it is proper to add that a written promise, under this section, is required as in other cases.¹ If the cause of action was still subsisting at the time, and not barred, a parol promise is sufficient.²

§ 736. The one hundredth section of the Code of Procedure, above given, is similar in its language to a provision of the Revised Statutes.³ That section was variously construed by the courts, until it was finally settled by the court of appeals, following decisions in the supreme court, superior court, and court of chancery, that the clause relating to the departure of the debtor from the state applies to cases where the debtor resides out of the state when the cause of action accrues, and subsequently comes into the state, as well as to cases where he is a resident of the state at such time, and that successive absences of the debtor from the state may be accumulated and the aggregate deducted.⁴ Further decisions on this general subject will be given, *infra*, § 1101. If a resident of the state goes therefrom, after the debt is due, and dies without returning to the state, the statute constitutes a bar to an action against his administrator for the same after six years from the time when the debt became due, excluding the time from the departure of the debtor until eighteen months after his death.⁵ But if he resides out of the state when the cause of action accrues, and until his death, the statute commences only from the time of issuing letters in this state.⁶ A temporary absence from the state, without change of residence, as on journeys, does not prevent the running of the statute.⁷

§ 737. The departure and absence of one joint and several debtor does not stop the running of the statute. To have that effect all the joint debtors must go without the state.⁸ Neither does a judgment against joint debtors stop the running of the statute against one not served with process, nor prevent him from taking advantage of the fact that the demand was barred before the first suit was brought, or before the action was commenced against him upon the judgment.⁹

§ 738. One of two joint makers of a promissory note cannot, after it is barred by the statute, revive the indebtedness as against the other by any acknowledgment or promise.¹⁰

¹ 2 Kern. 635. 36 N. Y. 88.

² 41 Barb. 612. 18 N. Y. 558.

³ 2 R. S. 297, § 27.

⁴ 2 Seld. 124.

⁵ 34 Barb. 321.

⁶ 1 Denio, 445. 6 Seld. 447.

⁷ 4 Denio, 56.

⁸ 2 Coms. 523.

⁹ 6 Seld. 96. 22 N. Y. 472. 5 Denio, 532. 2 Barb. Ch. 477. 2 Sand. 518.

¹⁰ 2 Seld. 61.

§ 739. Prior to the Code of Procedure, an indebtedness might be revived by any promise to pay it made within the period fixed by the statute of limitations, or by an acknowledgment of the existence of the debt, from which a promise to pay might be fairly implied. A payment made by the debtor within the period, was sufficient to show such an acknowledgment, and implied promise to pay the balance. The Code of Procedure, while requiring all such promises to be in writing, in order to render them valid, has excepted the implied promise arising from payment of principal or interest.¹ A payment, therefore, within six years, will revive a debt which would otherwise be barred by the statute.

§ 740. In an action by a subsequent endorser against prior endorsers, to recover the amount he has been held to pay, the *real* cause of action, though it is on the note itself, is for money paid for the use of the defendant, and the statute begins to run from the payment, not from when the note fell due.² But where the payee of a promissory note endorsed it and negotiated it, and being charged as endorser, was sued upon it, three days before the statute of limitations barred it, and after the statute had run, paid the note, and brought his action against the maker for the money paid, it was held that his remedy was upon the note alone, and the statute barred a recovery upon that.³

§ 741. By the Revised Statutes it was provided that judgments and decrees of courts, of this or other states, or the United States, should be presumed to be paid and satisfied after the expiration of twenty years, from the time of the signing and filing such judgment or decree; but in any suit at law or in equity in which the party against which such judgment or decree was rendered, or his heirs or personal representatives shall be a party, such presumption might be repelled by proof of payment, or of written acknowledgment of indebtedness, made within twenty years, of some part of the amount recovered by such judgment or decree; in all other cases it should be conclusive. It was also declared, that after the expiration of twenty years, from the time a right of action should accrue upon any sealed instrument for the payment of money, such right should be presumed to have been extinguished by payment; but such presumption might be repelled by proof of payment of some part, or by proof of a written acknowledgment of such right of action within that period.⁴ These provisions were held to be prospective merely,

¹ Code, § 110.

² 16 Barb. 177.

³ 8 Barb. 171.

⁴ 2 R. S. 301, §§ 46, 47.

and that where a judgment or debt upon a sealed instrument existed before the statute was passed, only the presumption of payment which existed at common law affected it; that that presumption might be repelled by any competent evidence, and that a payment or written acknowledgment was unnecessary.¹ Probably, from the lapse of time, no suits can now arise on such claims. If they do, the rule will be that the presumption of payment would be repelled by any proof showing that the judgment or sealed instrument has not been paid. The question of payment would be one of fact. Judgments and sealed instruments which date their existence after the Revised Statutes became a law, and prior to the Code of Procedure, will continue subject to the provisions of the Revised Statutes here examined.²

¹ 12 Wend. 490. 6 Seld. 170.

² See also § 1096 *infra*.

CHAPTER IV.

OF THE PARTIES TO A CIVIL ACTION.

§ 742. (1.) *In actions on contract.* Prior to the adoption of the Code of Procedure actions upon contract, with a few exceptions, were required to be prosecuted in the name of the person to whom the contract was made. The exceptions to the rule arose in the case of bills of exchange and negotiable promissory notes, and in a few other cases provided by statute. The Code of Procedure has changed the rule, and requires that every action must be prosecuted in the name of the party in interest, except as hereafter stated, but that the section shall not be deemed to authorize the assignment of a thing in action not arising out of contract; the exceptions are, that "an executor, or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another," and that when a married woman is a party her husband must be joined with her, unless the action concerns her separate property, or is between herself and her husband, when she may sue or be sued alone.¹ It will be impossible to enumerate all the cases which have been decided under these provisions. Some of them, and the leading principles which control, will be found in the succeeding sections.

§ 743. Actions *upon contract* may be brought by or against any natural person not under a disability created by law. Thus an infant may bring an action upon contract.² He is, as a rule, under a disability to make an express contract, and is therefore not liable in an action upon one. But he may be sued upon an implied contract for necessities furnished to him.³ When he is a party to an action he must appear by guardian.⁴ The committee of a lunatic or habitual

¹ Code, §§ 111, 113, 114.

² 1 Denio, 460. 2 Sand. 306.

³ 2 R. S. 445, § 1. 3 id. (Banks' 5th ed.) 745. 29 Barb. 160.

⁴ Code, § 115. See *infra*, §§ 924, 925.

drunkard may bring an action for a debt due him, either in the name of the lunatic or drunkard, or his own.¹ This statute provides that receivers and committees of lunatics and habitual drunkards *may* sue in their own name "for any debt, claim or demand transferred to them, or to the possession or control of which they are entitled as such receiver or committee." In all cases not covered by this statute, the action *must* be in the name of the lunatic or drunkard,² as actions for money had and received by a defendant for the lunatic, or by the lunatic lent and advanced to him;³ if the committee receives notes, he may sue on them in his own name, and without describing himself as committee.⁴ If no committee has been appointed, the lunatic, in all cases, sues in his own name. And so he would in every case, in all actions for torts, for they are not embraced in the statute.

[§ 743a.] Consignees of goods and holders of bills of lading may maintain actions against a carrier for loss of goods, if they have made advances;⁵ a carrier may bring an action in his own name for an injury to the property intrusted to him to carry;⁶ a note payable or endorsed to A, as "cashier, &c.," may be sued by his bank.⁷

As to what causes of action may be assigned, the decisions are numerous. The general rule is, that whatever cause of action would survive, and go to the personal representatives in case of death, may be assigned, and that whatever would not, cannot be.⁸ Under this rule, causes of action for injuries to property, or for its conversion;⁹ against a common carrier for loss or injury to goods intrusted to him;¹⁰ for money lost in gaming;¹¹ against a sheriff for neglecting to arrest;¹² for negligently setting fire to grass, hay and fences;¹³ for negligently killing a yoke of oxen;¹⁴ against an innkeeper for money stolen from a guest,¹⁵ and other similar causes, may be assigned. But such as do not survive, cannot be. Such causes are those for injuries to the person;¹⁶ where false and fraudulent representations are made as to the solvency of the vender of merchandise,¹⁷ and similar cases.

¹ Laws of 1845, ch. 112, § 2. 3 R. S. (Banks' 5th ed.) 135, § 11.

² 8 Barb. 532.

³ 1 Hill, 97.

⁴ 12 How. Pr. R. 287.

⁵ 3 Coms. 322. 28 Barb. 382

⁶ 38 Barb. 574.

⁷ 29 N. Y. 619.

⁸ 1 Seld. 347. 3 Kern. 335. 22 Barb. 110. 34 id. 330. 36 id. 270.

⁹ 2 Coms. 293. 2 Kern. 622. 24 Barb. 382. 36 id. 270. 38 id. 574.

¹⁰ 17 N. Y. 466. 30 id. 594. 28 Barb. 605. 38 id. 574.

¹¹ 19 N. Y. 26. 48 Barb. 364.

¹² 38 Barb. 18.

¹³ 25 How. Pr. R. 285.

¹⁴ 22 Barb. 110.

¹⁵ 4 E. D. Smith, 88.

¹⁶ 4 Duer, 74. 7 How. Pr. R. 492.

¹⁷ 3 Kern. 322.

The assignment may be without any consideration whatever,¹ and will be sufficient if it vests the property in the assignor, as under an assignment for the benefit of creditors.²

§ 744. Where one of two plaintiffs in a judgment has become insolvent and assigns his property for the purpose of obtaining a discharge under an insolvent act, an action upon the judgment should be brought in the name of the solvent partner and the assignee.³

§ 745. At the common law a husband and wife must join in an action upon a claim due to the wife before marriage,⁴ and for a personal injury to her; and no action could be maintained by a wife without joining her husband. In some cases the action for a claim of the wife might be brought by the husband and wife, or by the husband alone, as on a covenant, obligation or promissory note made after marriage to the wife alone, or to the husband and wife.⁵ Where the action was brought by both it was necessary to show how the wife had an interest in it.⁶ The recent statutes in behalf of married women have changed these rules in many particulars, as will be seen *infra*, sections 1029, &c. In addition to these statutes and the provisions of the Code given *supra*, section 742, the Code (sections 117, 118) provides that "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title;" and that "Any person may be made a defendant, who has or claims an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein."

§ 746. In like manner, actions may be brought by or against corporations, which, in law, are deemed artificial persons. They may also be brought by and against the supervisors of a county, by loan officers and commissioners of loans of a county, by county superintendents of the poor, by supervisors of towns, by overseers of the poor of the several towns, by town superintendents of common schools, by commissioners of highways and by trustees of school districts upon any contracts lawfully made with them or their predecessors in their official character, to enforce any liability or any duty enjoined by law to them or the bodies they represent, and to recover damages for injuries done to the property or rights of such officers

¹ 14 Barb. 533. 27 id. 178. 38 id. 594.

² 30 Barb. 389.

³ 23 Wend. 63.

⁴ 1 Ch. Pl. 18, 19.

⁵ 10 John. 49. 13 Wend. 271.

⁶ 2 Caines, 221.

or the bodies they represent. In these cases the actions are brought by them individually, specifying in the process and pleadings the name of their respective offices.¹ The pleadings must also contain the proper averments to show their official character.² They may also be brought against counties and towns. When brought against a county the board of supervisors of the county is named as defendant; when against a town it is sued by its name.³

§ 747. In actions upon contract all the parties interested in it as joint owners, assignees or trustees, should be named as plaintiffs, and in like manner all the persons jointly bound by the contract should be named as defendants. So, where an injury has been done to property held by joint tenants or tenants in common, or where it has been taken or detained, the action must be brought in the name of all the joint owners.⁴ Under this rule, where several own property, but it is held in the name of one of them for convenience, and he sells it in his own name for the benefit of all to one who is ignorant of the joint ownership, an action for it can and probably must be brought in the names of all the owners.⁵ The rule, however, does not require an executor or administrator, or the trustee of an express trust, or a person expressly authorized by statute to sue, to join with him the person for whose benefit the action is prosecuted;⁶ and in the case of a dormant partner it is necessary that he be joined, when the firm is sued as a defendant.⁷ And so, if joint debtors reside in different states, they may be sued separately in the states having jurisdiction of their respective persons and property, and the one suit or judgment therein is no bar to the other.⁸

§ 748. In case one or more of the joint owners of the contract or claim has died, the action must be brought in the names of the survivors, without joining the representatives of the deceased, and on the death of the last survivor his executors or administrators must sue.⁹ Where executors or administrators bring an action, all to whom letters have been issued must join.¹⁰ They may bring an action for wrongs committed to the property, rights or interests of

¹ 2 R. S. 473, §§ 92, 93, 96. 3 id. (Banks' 5th ed.) 774, §§ 105, 106, 109. 36 Barb. 392.

² 19 Barb. 179.

³ 2 R. S. 473, § 95. 3 id. (Banks' 5th ed.) 774, § 108.

⁴ See Code, § 119.

⁵ 45 Barb. 171.

⁶ Code, § 118.

⁷ 3 Cowen, 84. 4 Wend. 628. 19 id. 525. 1 Bosw. 28. 30 N. Y. 374. 2 Keyes, 454. 18 Ill. 37. 4 Duer, 416.

⁸ 29 Barb. 549.

⁹ 1 John. 34. Gra. Pr. 60. 1 Chit. Pl. 12. 31 Ill. 254. 1 Minn. 169.

¹⁰ Laws 1838, ch. 149. 3 R. S. (Banks' 5th ed.) 201, § 2.

their testator or intestate during his lifetime, and may be sued for the waste, destruction, taking or conversion of another's property by their testator or intestate.¹ The provision does not extend to injuries to the person of the plaintiff committed by the testator or intestate, nor for injuries to the person of the testator or intestate.

§ 749. An action upon joint contract should be brought against all the parties to it if living, and, if any of the parties to it in default are dead, against their survivors. If the contract was made by an agent who discloses the name of his principal, no action lies against him upon it unless it appear that he had no authority from his principal to make it, in which case he is personally liable as if he had made it in his own name.²

§ 750. If the contracting party in default be dead, the action must be brought against his *personal representatives*, by which term is meant either his executors or administrators. If some of these be dead the action should be against the survivors or survivor.³ In neither of these cases can a justice of the peace entertain jurisdiction.⁴

§ 751. One partner cannot bring an action in a justice's court against his copartner in relation to the partnership transactions, except upon a settlement of the partnership accounts and balance struck, upon which an express promise to pay has been made. In this case a justice may entertain an action upon the express promise.⁵ If, however, two persons enter into an agreement each to advance certain moneys, or to perform certain services in a partnership or joint adventure, either may bring an action at law against the other for his neglect to perform his part of the agreement, and if the damages claimed are within his jurisdiction, a justice has cognizance of the cause.⁶ Such an action may be brought for a breach of the copartnership articles in dissolving them before the period limited.⁷

§ 752. If the contract is joint and several, the action may be brought against all of the contracting parties in default, or against any one of them severally. Where there are a number of persons named as contractors they will be deemed joint contractors unless it is otherwise expressed in the contract.⁸ If, however, a promissory note be drawn, "I promise to pay, &c.," and subscribed by two or

¹ 2 R. S. 114, §§ 5 and 6. 3 id. (Banks' 5th ed.) 202.

² 13 John. 58. 15 id. 1. Ante, § 169.

³ 11 John. 18. 1 Nevada, 233.

⁴ Code, § 54, sub. 5.

⁵ 16 Wend. 601. See 19 Barb. 196. Ante, § 210.

⁶ 24 Wend. 153. 25 id. 450.

⁷ 6 Seld. 489.

⁸ See 13 Cal. 31.

more persons, it is held to be a joint and several note.¹ If a partner makes a note which, in its terms, is joint and several, and signs the partnership name thereto, he may be sued upon it, alone, without joining the other partner.²

§ 753. If the action be upon a joint contract, it should be brought against all the parties liable upon it, and if it is not so brought, the want of proper parties will be a good answer.³ If, however, the want of proper parties be not set up in the answer, it will be too late to make the objection at the trial, and if the contract is there proved to have been made by the defendants and other persons as joint contractors, it will be sufficient to warrant a recovery against the defendants named.⁴

§ 754. Formerly, if too many persons were made defendants, whenever the fact appeared, at any stage of the action, it was a fatal objection to a recovery by the plaintiff.⁵ The difficulty in actions in courts of record is obviated by the Code of Procedure. There, any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff,⁶ and judgment may be given for or against one or more of several plaintiffs, and for or against one of several defendants. But that section is not expressly made applicable to justice's courts, and no provisions seem to do so by implication, and, therefore, the ancient rule appears to govern in a justice's court.⁷

§ 755. At the common law, when a single woman who was indebted to any person was married, her husband became liable to pay the debt, and must be joined with her as defendant in an action brought upon it.⁸ If, however, he should die, his executors were not bound, and the wife alone could be sued.⁹ If the action were commenced against her before the marriage, it might, after the marriage, have been prosecuted without any change of parties.¹⁰ The debt remained due from the wife, and the husband, so long as his relation to her continued, was made a party on account of his liability for her debts, and judgment against him in an action for her debt before marriage, in which she was not made a party, might be reversed for error. And the rule was so rigid that a promise by the husband to pay his wife's

¹ 7 Mass. 58.

² 35 Barb. 55.

³ 1 Ch. Pl. 47. 4 Kern. 465. 28 Barb. 19 Barb. 666. Code, § 64. 603. 18 Ill. 37. 3 Cal. 465.

⁴ 1 Barn. & Ald. 224. 32 N. Y. 685. 19 Barb. 666. 16 Ill. 340, 369.

⁵ 2 John. 213. See 5 Wis. 245.

⁶ Code, § 118.

⁷ 11 How. Pr. R. 140. 17 id. 312. See

⁸ 1 Chit. Pl. 46, 48.

⁹ Id. 67. 13 Ind. 44.

¹⁰ 2 Cowen, 581.

debt contracted before marriage, was held void for want of consideration, and notwithstanding it, the wife must be joined with him in an action upon the indebtedness.¹ If, however, an express promise in writing were made upon some new consideration, as forbearance, it would be valid. A recent statute, in New York,² has changed this rule, and rendered a husband liable for his wife's debts contracted before marriage only to the extent of the property received from her. This statute is given, *infra*, section 1032.³

§ 756. By the one hundred and twentieth section of the Code of Procedure, it is provided that "Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action at the option of the plaintiff." This changes the old rule, so far as *written agreements* are concerned (these not evidenced by a writing not being embraced by this section⁴), under which a plaintiff was bound to treat a joint and several contract as wholly joint or wholly several; that is, he could not bring a suit against two parties who were bound by a joint and several agreement,⁵ and permits an action to be brought against any one or more of them, or the whole number.⁶ It also allows parties whose contract is not identical, to be joined as defendants, provided they have signed or are parties to the same agreement, as a lessor, and one who has guaranteed the performance of the lessor's covenants.⁷ But if the separate undertaking of the surety is contained in a different instrument, the principal and surety cannot be joined.⁸

§ 757. *Actions for wrongs.* All persons natural as well as corporations,⁹ may be parties in actions for wrongs. Thus an infant,¹⁰ a married woman, an idiot or a lunatic, may be either plaintiff or defendant in such an action, subject to the rules in relation to their appearance by guardian, husband or committee, which are provided by the statute.¹¹

§ 758. The action must *in general* be brought in the name of the

¹ 8 John. 149.

² Laws of 1853, chap. 576. 3 R. S. (Banks' 5th ed.) 241, §§ 85, 86.

³ See, on this general question, 13 Ind. 44. 4 Greene (Iowa) 185.

⁴ 38 Barb. 616.

⁵ 6 Cal. 176. 9 Mich. 380.

⁶ 38 Barb. 623. 11 How. Pr. 569.

⁷ 23 N. Y. 286.

⁸ 10 Barb. 638. 24 id. 39. 11 How.

Pr. 218. 10 Iowa, 226. See also 4 Seld. 207. Code of Ohio, § 38. 25 Cal. 520. 10 Ind. 174.

⁹ 3 Hill, 531. 2 Den. 433. 34 N. Y. 30.

¹⁰ 2 R. S. 445, § 1. 3 id. (Banks' 5th ed.) 745. 21 Wend. 615. 38 Ill. 145. 43 Mo. 119.

¹¹ 1 Ch. Pl. 86.

person whose legal interest is affected thereby.¹ Thus for a wrong to the person of an infant, the action must be brought in his name, but for an injury to his real estate, it may be brought by his guardian in socage.² An action for property levied on by a deputy sheriff, is not brought by him but by the sheriff.³ A bailee may bring an action for an injury to the bailed property, while in his possession.⁴

§ 759. Where two or more persons have a right to any property wrongfully injured or converted, whether they hold it as joint tenants or tenants in common, the action for the wrong should be brought in their joint names.⁵ The omission to join all the proprietors could only be taken advantage of by a plea in abatement under the ancient system of pleading, and if not pleaded in abatement, could be objected at the trial only for the purpose of having an apportionment of damages.⁶ This rule seems unaffected by the Code of Procedure, excepting by the provision that "if the consent of any one who should have been joined as a plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint,"⁷ and that now the defense is by answer, and may be joined with any defense on the merits.⁸ But where the undivided interest of a plaintiff in a chattel is converted, as where he owned three-fourths of a ship, and the rights of his co-proprietor are not interfered with, he might, at common law, bring his action for his share of the ship and recover; and in this case the omission to join his co-proprietor could not be objected by plea in abatement, or as a defense, for the wrong is not to the joint owners, but a wrong to one of them not affecting the other.⁹ If two tenants in common bring an action for the conversion of their joint property, one cannot release or discharge the action so far as to defeat the rights of the other, who may continue to prosecute the action in both names for his own share.¹⁰

§ 760. The joinder as plaintiffs of persons who were not interested in the subject-matter of the action, could be taken advantage of at any time before the cause was finally submitted.¹¹ The Code of

¹ Code, § 111.

² 1 R. S. 718, §§ 5, 6. 3 *id.* (Banks' 5th ed.) 2. 17 Wend. 75.

³ 35 Barb. 620.

⁴ 48 Barb. 339.

⁵ 1 Chit. Pl. 54. 13 John. 286. 15 *id.* 479. Code, § 111.

⁶ 1 John. 471. 6 *id.* 108. 8 *id.* 151.

1 Wend. 380. 29 Barb. 120.

⁷ Code, § 119. See 19 Barb. 666.

⁸ 4 Kern. 465. 21 N. Y. 399. 10 How. Pr. R. 164.

⁹ 4 Camp. 272.

¹⁰ 29 Barb. 120.

¹¹ Gra. Pr. 94, 95.

Procedure probably has not varied the rule in actions brought in justice's courts.¹

§ 761. Where one of several persons jointly entitled to damages for a wrong dies, the action should be brought in the name of the survivors.²

§ 762. At common law an action for a wrong done either to the person or property of another, could not, after his death, be the subject of an action by his personal representatives against the wrong-doer; and on the other hand the personal representatives of a wrong-doer, after his death, were not liable to an action for any wrong committed by him. These rules have been changed in New York by statutes which provide that "Executors and administrators shall have actions of trespass against any person who shall have wasted, destroyed, taken or carried away, or converted to his own use, the goods of their testator or intestate in his lifetime. They may also maintain actions for trespass committed on the real estate of the deceased, in his lifetime;" and "Any person, or his personal representatives, shall have actions of trespass against the executor or administrator of any testator or intestate, who in his lifetime shall have wasted, destroyed, taken or carried away, or converted to his own use the goods or chattels of any such person, or committed any trespass on the real estate of any such person."³ It is also provided that "For wrongs done to the property, rights or interests of another for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, or after his death, by his executors or administrators, against such wrong-doer, and after his death against his executors or administrators, in the same manner and with the like effect, in all respects, as actions founded upon contracts."⁴ But the preceding section shall not extend to actions for slander, for libel, or to actions of assault and battery, or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator."⁵ Subsequent statutes also provide that actions may be brought where the death of a person shall be caused by the wrongful act, neglect or default of another, the action being brought by and in the names of the personal representatives of such deceased person, the recovery being limited to five thousand dollars.⁶ As

¹ Ante, § 754.

² 1 Chitty's Pl. 77.

³ 2 R. S. 114, §§ 4, 5. 3 id. (Banks' 5th ed.) 202.

⁴ 2 R. S. 447, § 1. 3 id. (Banks' 5th ed.) 746.

⁵ Id. § 2. (id.)

⁶ Laws of 1850, ch. 450; 1849, ch. 256. 3 R. S. (Banks' 5th ed.) 589, § 3, &c.

such cases will rarely, if ever, be brought in justices' courts, even if they have jurisdiction of them, we do not give the statutes in full, nor refer to the many decisions that have been made thereon. With the exception of these statutory provisions, all wrongs committed in the lifetime of another to his property or rights, are the proper subject of an action by his personal representatives; while those committed upon his person remain subject to the rule at the common law. And, on the other hand, injuries to the property or rights of another committed by a deceased person are the subject of action against his personal representatives, but of which a justice has not jurisdiction.¹

§ 763. For an injury to the real or personal property of a woman before her marriage, the husband and wife, at common law, must join as in actions upon contracts made to her while unmarried, and if the wife survives her husband, she must sue alone.² And the rule is the same if the wife's interest be only as a guardian in socage.³ Under the Code, in such cases, she may now sue alone.⁴

§ 764. It has been remarked that all persons may be parties in actions for wrongs.⁵ It is no ground of defense in such action that the defendant is an infant, a married woman, or an idiot or lunatic, though infants, idiots and insane persons are not required to exercise the same degree of care as other persons.⁶ Each of them is liable for all wrongs which they commit. Thus, where goods are delivered to an infant under a contract of bailment, and he is guilty of a positive wrongful act or injury to them, by which the owner sustains damage, he is liable to him for their conversion.⁷ And it makes no difference that the contract was void. The act, however, must be something more than a mere omission to do what he ought, by the contract, to have done. It must amount to a positive wrongful act. As where the infant has hired a horse to go to a certain place, and he goes beyond it or to another in a different direction,⁸ or drives him so violently that he dies of the improper treatment.⁹ So he is liable, even though he is under seven years of age, for negligence;¹⁰ for torts to personal property;¹¹ for fraudulently obtaining goods upon credit, with an intention not to pay for them;¹² or by falsely representing

¹ Code, § 54, sub. 5.

² 1 Chitty's Pl. 85.

³ 5 John. 66.

⁴ Code, § 114.

⁵ Ante, § 757.

⁶ 29 Barb. 218. 5 Duer, 49. 43 Mo. 119.

36 id. 484. 3 Wend. 391, 394.

⁷ 6 Cranch, 226. 3 Pick. 492, 494.

⁸ 3 Pick. 492. 5 Duer, 49.

⁹ 2 Wend. 137.

¹⁰ 3 Wend. 391.

¹¹ 29 Barb. 218.

¹² 5 Hill, 391. See 4 Seld. 440.

himself to be of full age.¹ But where the tort or fraud consists merely in the breach of a contract, the infant is not liable in an action for the tort.² A lunatic is not liable to vindictive damages.³ Where the wrong is committed by an idiot or lunatic who is in the charge of a committee, it is improper to bring an action against him, as the proper remedy is to apply by petition for relief to the court which appointed the committee.⁴ A parent is not liable for his infant's torts, unless they are committed under his assent or direction.⁵

§ 765. All persons who direct, advise, aid, assist or countenance the commission of a wrong, either directly or indirectly, are considered joint wrong-doers, and may be sued as principals and made accountable for the whole damage sustained. And even an assent to a wrong committed for their benefit, renders them equally liable with him who actually committed it.⁶ But the rule will not apply in the case of a prior or subsequent assent to a wrong by a married woman, an infant,⁷ an idiot or a lunatic, for their consent would be void. In order, therefore, to render either of them liable, they must have actively participated either in committing the wrong, or in aiding, assisting or countenancing its commission, previous to or at the time.⁸ A slight participation or interference is sufficient to create the liability; as the indemnifying an officer in selling the goods of a stranger upon execution.⁹ But although the officer levy on the goods of a stranger, the plaintiff in the execution is not liable unless he authorize, request or assent to the levy. The purchaser at the sale is, however, liable if the goods levied upon did not belong to the defendant on the execution, because, in that case, the seizure and sale were wholly unauthorized by the process.¹⁰ The guilty knowledge of one trespasser, and his acts and declarations, are the knowledge, &c., of his co-trespassers.¹¹ If a sheriff ratifies the misfeasance of his deputy, he may be sued with him as a joint trespasser.¹² If an attorney merely issues an execution, and communicates his client's directions to the sheriff, and, in pursuance of his client's authority and direction, executes an indemnifying bond to the sheriff, he is not liable, although the seizure was wrongful.¹³ If suit is brought against several joint

¹ 1 Daly, 334.

² 8 Term R. 335.

³ 3 Barb. 647.

⁴ 43 Mo. 119.

⁵ 5 Paige, 489. 2 id. 422. 3 id. 199.
See 2 Barb. 153.

⁶ 11 John. 285. 1 Chitty's Pl. 91. 43 Mo. 119.

⁷ 1 Ch. Pl. 91.

⁸ 1 Chit. Pl. 91.

⁹ 15 N. Y. 409.

¹⁰ 1 Chit. Pl. 91

¹¹ 23 Ill. 403.

¹² 5 Seld. 598.

¹³ 3 Kern. 577.

trespassers for a cause which is proved, it cannot be waived, and evidence given of another against one only.¹ And so, in such a case, if a joint trespass is proved against a portion of the defendants, the plaintiff cannot afterward give evidence of another trespass by all, even as against such part alone.²

§ 766. As we have already seen, a master or principal is liable for any injury occasioned by the negligence or unskillfulness of his servant or agent while in the course of his employment; as for carelessly driving his carriage against another.³ In like manner one is liable for any irregularity in the proceedings of his attorney by which another is injured; as if the goods of a defendant should be levied upon a judgment, and execution afterward set aside for irregularity. The party is also liable for the acts of his sub-agent engaged in his business.⁴ A corporation is liable for the acts of its agent or his negligence to the same extent as persons.⁵ If the driver or brakeman of a street railway car is guilty of negligence in assisting passengers to get on board, the owners of the road are liable.⁶

§ 767. In all actions for wrongs, the plaintiff may make all the joint wrong-doers defendants, or he may bring separate actions against them, and, as his recovery may be against any one of the defendants while the others are acquitted, it will not defeat his action if he, by mistake, join an innocent person with the guilty defendants. In this case the innocent person may be acquitted, while the action proceeds to judgment against the others.⁷

[§ 767*a*.] No one can be both plaintiff and defendant in the same action, *i. e.* a party has no right of action against himself.⁸ Therefore, it was held that the trustees of a religious society could not sue one of their number.⁹

¹ 7 Cal. 152.

² 15 Ind. 274.

³ Ante, §§ 481, &c. See also 34 Barb. 249. 8 Ind. 127.

⁴ 4 Camp. 72. 6 Cowen, 189. 6 Dowl. & Ry. 275. 29 Barb. 419.

⁵ 34 N. Y. 30. 36 Mo. 546.

⁶ 26 N. Y. 49.

⁷ 1 Chitty's Pl. 98. 14 John. 426. 29 N. Y. 591. 30 id. 78. 44 Barb. 347.

⁸ 1 Ch. Pl. 46. 27 Barb. 553.

⁹ 27 Barb. 553.

CHAPTER V

OF THE JOINDER OF ACTIONS.

§ 768. The ancient rules in relation to the joining of two or more causes of action in a single suit are, in the practice of courts of record, superseded by the one hundred and sixty-seventh section of the Code of Procedure. That authorizes the union in the same complaint of several causes of action, all of which arise, 1, from the same transaction; 2, on contract; 3, injuries to person or property; 4, injuries to character; 5, claims to recover real property, and rents and profits; 6, claims to recover personal property; and 7, claims against a trustee. In each case the causes united must belong to one of the classes and must affect all the parties to the action, and not require different places of trial, and must be separately stated. There is no provision of the Code extending the new rule to actions in justices' courts, and the general rules formerly existing remain so modified as is necessary to apply them to the changes from the former actions to the civil action. The following is a synopsis of those rules:

1. Where several causes of action of the same nature existed between the same parties and in the same right, they might be joined. For example, where one held several promissory notes, and also had an account against another, he might join all his demands in one action. He might also do so if he had several causes of action for trespass committed upon his person or property, or for slander, or any other injury the subject of an action on the case, or of debt or replevin; but he could not unite a cause of action in replevin with one upon a promissory note, or for slander, or an injury to his person or property. Again, if one of the causes of action was his own, and the other one in which he was only interested as an executor or administrator, or as a trustee, he could not unite them; and so, if one was against the defendant personally, and another one in which he was liable as executor or trustee or in some other character, they could not be joined. The test was this, can the same plea be pleaded to and the same judgment be given upon

each cause? If they might, the causes, whatever might have been their number, might be joined.¹

2. Actions upon contracts not under seal, as upon a promissory note, for money lent, a warranty on a sale and a contract of bailment might be united; but a claim upon a contract under seal, which was the subject of an action of *debt* or *covenant*, could not be united with one upon a contract not under seal, if objection to the joinder were seasonably made.²

3. Several trespasses might be joined, as a trespass on real estate and one for taking or injuring personal property, or such an one with one for a rescue of animals impounded.³

4. Several causes of action, one of which was for deceit on a sale, and another for a deceit in another transaction might be joined where the deceit was the *gist* or ground of the action in both cases.

5. An executor or administrator might join in one action a claim held by him, as such, originating in the lifetime of his testator or intestate, with a similar one held by him, as such, originating after the death of his testator or intestate; as a promissory note made to his testator with one which he as his executor had received on account of the estate.⁴ But one could not unite a cause of action arising against another before his death with one arising afterward against his executors.⁵

6. Wherever different causes were united in a single action, each was stated in a distinct *count* of the *declaration*.

§ 769. The present system of pleading, recognizing no distinct pleas to any particular cause of action, and no particular form of judgment, the former test in relation to joinder of actions will be found an impracticable one. It will, however, be safe to observe the ancient rules so far as they are not quite certainly changed by the new system. Claims of the same nature may be united, of course, as under the old practice; and there can now be no reason why those on contracts growing out of sealed instruments may not be united with those on contracts by parol; but where there are two or more causes of action, each should be stated separately in the complaint. In the succeeding sections we give further decisions in cases before, as well as since the Code, upon this general question of joinder of causes of action.

¹ Grah. Pr. 95. 22 Wend. 369. 20 Barb. 442. 21 id. 245. 6 How. Pr. R. 131. 5 John. 240.

Cal. 224. 27 Ill. 478.

² 22 Wend. 369.

³ 1 Chitty's Pl. 229. Gould's Pl. 212.

⁴ 1 Ch. Pl. 223.

⁵ 12 John. 349. 5 Wend. 36. 8 id. 530.
7 Cowen, 58.

§ 770. Where a claim belongs to two or more persons jointly, either on contract or for a wrong, they cannot unite with it, in an action, a separate claim due to one of them.¹ Thus, a claim due to husband and wife cannot be joined with one due to the husband alone; as a claim for a debt due the wife before marriage with one due to the husband, or for an injury to the person of the wife with one for the expense occasioned to the husband thereby; but where partners have divided an account against a debtor and he has consented to it and agreed to pay to each partner his separate share of the debt, each partner owns his part in severalty and may bring his action upon it and unite it with another cause of action due to him alone.²

§ 771. A sole surviving creditor may unite his claim as such with one owing to him individually. Here by his survivorship the joint claim vests in him as in his own right, and the two claims are therefore held in the same right.³

[§ 771*a*.] Causes of action arising upon contracts, and those for torts, cannot be joined.⁴

[§ 771*b*.] A constable and his sureties may be sued in the same action, their obligations arising on a bond signed by each of them.⁵ It is not necessary that the several causes of action should affect all the defendants equally; it is sufficient that each cause of action affects each defendant in some degree.⁶

§ 772. Where there is an improper joinder of actions it may be objected to by the answer, and the court may allow the plaintiff to amend by striking out a portion of the causes so as to obviate the difficulty, and leave the remainder of the causes of action such as may be united.⁷ If, however, there be an improper joinder of parties, and the objection be seasonably made, there is no remedy. In actions upon contracts, in justices' courts, the proper parties must be shown to be plaintiffs and defendants, or a recovery will not be warranted. In actions for wrongs, if all the parties interested in the recovery are not made plaintiffs, and the defendant does not object by his answer, it will only avail him by having an apportionment of the damages,⁸ and if he neglects to avail himself of the non-joinder,

¹ 16 How. Pr. R. 195.

² 5 Halst. 153. 2 Mass. 401. 3 Bosw. 450.

³ 1 Chitty's Pl. 231 to 235.

⁴ 21 Wend. 29. 1 Hill, 545. 9 Barb. 230.

9 How. Pr. R. 311. 12 id. 331. 15 id.

221. Code, § 167. 35 Mo. 483.

⁵ 10 Wend. 370. 10 How. Pr. R. 361.

⁶ 15 How. Pr. R. 333; also 1 Kern. 128.

4 Bosw. 120.

⁷ 21 Wend. 29. 19 Barb. 666. Code, §

64, sub. 7.

⁸ 5 Hill, 59 N. a.

the recovery will be no bar to a subsequent action brought by the party not joined.¹

§ 773. Where no objection is made in a justice's court to the misjoinder of causes of action, a judgment will not be reversed for that cause. In order, therefore, to avail himself of the objection, the defendant must make it by answer.²

§ 774. One is not permitted to split up a single transaction, whether of contract or wrong, for the purpose of bringing separate actions upon it.³ Thus where a merchant makes sale of a large number of articles in an *entire contract*, he cannot bring one action for a part and another for the remainder, and if he obtains judgment upon a part of the demand so split up, it will be a bar to an action for the residue, or to setting it up by way of set-off in an action by the other party.

§ 775. An *entire demand* under the rule contained in the last section need not necessarily have accrued at the same time. Indeed, an ordinary merchant's account, consisting of purchases made upon fourteen different days, was held an entire demand, and a judgment obtained in an action brought upon the first seven items when the whole account was due, was held a bar to a fresh action upon the remainder.⁴ A similar doctrine was held where there were breaches of several and distinct covenants contained in the same instrument. A recovery upon one was a bar to actions upon the others.⁵

§ 776. The rule requiring the joinder of actions upon an entire demand does not prevent a plaintiff from bringing separate actions for each of a series of similar wrongs committed at different times, nor upon a note and an account, or any other causes of action which do not form a part of a single demand.

¹ 5 Hill, 59.

⁴ 8 Wend. 492, 4. 1 id. 488.

² 3 Hill, 609. 4 Barb. 361. 24 id. 39.

⁵ 19 Wend. 207.

³ 19 Wend. 207, and see *infra*, §§ 1079, &c. 16 N. Y. 548. 23 Iowa, 293.

CHAPTER VI.

OF THE ELECTION OF ACTIONS.

§ 777. In many cases where the property of a person has been taken or detained from him, or he may, for other reasons, as for a fraud, have an action of tort; he may waive the wrong and bring an action upon the defendant's implied contract to pay him for it.¹ This rule is retained by the Code.² There are, however, advantages in bringing an action upon the wrong. In such an action, bare possession of the property in the plaintiff is sufficient to sustain the action against a wrong-doer, and the judgment in an action for a wrong warrants an execution against the body of the defendant, while one in contract only authorizes an execution against his property. In many other cases, he has an election, as to bring an action for specific property (the old action of replevin), or for its value; but when he has made his election and brought his suit, his right to pursue the other remedy is extinguished.³

§ 778. Again, in actions upon certain contracts where the defendant, for a consideration paid him, has covenanted to do a certain thing and has failed to do it, the plaintiff may either bring his action for his damages, or, by disaffirming the contract, bring his action for the consideration money paid; or where he has a remedy at common law he may resort to one furnished by statute.⁴ But when both the remedy and the right are given by statute, the remedy so provided must be pursued, and in such a case, if the statute is repealed, the right of action is gone, even in respect to suits then in progress.⁵

§ 779. Where an action may be brought upon an implied contract, or for a wrong, it is also desirable to bring it upon the wrong if there be any doubt as to the persons who should be made parties, for

¹ Chitty's Pl. 113. 13 Wend. 154. 1 Hill, 240, note a. 3 id. 282. 5 id. 584, note a. 5 Denio, 370. 27 Barb. 652. 34 id. 84. 54 id. 164.

² 9 Abbott, 411. 7 How. Pr. R. 281.

³ 18 N. Y. 552. 34 id. 473.

⁴ 5 John. 175. 10 id. 389. 13 id. 322. 5 Cowen, 165. 24 Barb. 362. 25 Cal. 535. 2 id. 243.

⁵ 5 John. 175. 1 Hill, 324. 3 How. Pr. R. 142. 4 id. 36. 2 Cal. 243. 7 id. 126. 9 id. 262. 31 id. 122. 8 Ind. 281. 9 id. 283. 8 Ohio N. S. 590. 14 Iowa, 296.

the reason that the non-joinder of a plaintiff in an action for a wrong can only be taken advantage of by answer, and the joinder of innocent persons with the guilty ones as defendants, is no bar to a judgment against the proper parties. As for example, where three defendants had the loading of a hogshead of molasses, and they so negligently conducted themselves in doing it as to spill the molasses. Here the action might have been brought upon their contract to perform the work skillfully; but in this case it would have been necessary to show the contract by the three as well as the injury. It was, however, brought for the wrong, and then on its appearing that but one of the three was interested in the contract, or was guilty of the negligence, a judgment was recovered against him for the damage, although the others were acquitted.¹

¹ 3 East. 62.

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